153 U.S. 252

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 1045.

THE NORTHERN PACIFIC RAILROAD COMPANY, APPELLANT,

vs.

A. G. CLARK, COUNTY AUDITOR OF KIDDER COUNTY, NORTH DAKOTA, ET AL.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED OCTOBER 21, 1893.

(15,429.)

(15,429.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 1045.

THE NORTHERN PACIFIC RAILROAD COMPANY, APPELLANT,

vs.

A. G. CLARK, COUNTY AUDITOR OF KIDDER COUNTY, NORTH DAKOTA, ET AL.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

INDEX.

	Original.	Print.
Certificate of United States circuit court of appeals	1	1
Amended bill of complaint	2	1
Demurrer	8	8
Questions certified	9	9
Judge's certificate	12	10
Clerk's certificate	12	10

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 11, 1893.

1 United States Circuit Court of Appeals, Eighth Circuit, May Term, 1893.

NORTHERN PACIFIC RAILROAD COMPANY, Appellant,
v.
A. G. CLARK, County Auditor of Kidder County, N. D., *et al.*, Appellees. } No. 337.

Appeal from the circuit court of the United States for the district of North Dakota.

The United States circuit court of appeals for the eighth circuit, sitting at the city of St. Paul, Minnesota, on this fourth day of October, A. D. 1893, hereby certifies that upon the record on file in said court in the case wherein The Northern Pacific Railroad Company is appellant and A. G. Clark, county auditor of Kidder county, N. D.; William M. Graves, county auditor of Stutsman county, N. D.; O. H. Perry, county auditor of Richland county, N. D., and C. T. Lange, county auditor of McLean county, N. D., are appellees, and which cause is now pending before this court upon an appeal duly taken from the decree rendered by the United States circuit court for the district of North Dakota, the following facts are made to appear, to wit:

That on the 6th day of June, A. D. 1893, there was filed
2 in the office of the clerk of the United States circuit court for the district of North Dakota by said Northern Pacific Railroad Company an amended bill of complaint, which (omitting therefrom the certain schedules of lands thereunto attached) is in the words and figures following:

To the honorable judges of the circuit court of the United States for the district of North Dakota:

The Northern Pacific Railroad Company, a corporation created by and organized and existing under and by virtue of an act of Congress of the United States approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's sound on the Pacific coast by the northern route," and those certain acts and joint resolutions supplemental thereto and amendatory thereof, permission of the court hereto having been obtained, brings this its amended bill against A. G. Clark, county auditor of Kidder county, N. D.; W. M. Graves, county auditor of Stutsman county, N. D.; O. H. Perry, county auditor of Richland county, N. D., and C. T. Lange, county auditor of McLean county, N. D., all citizens and residents of the said State of North Dakota.

And thereupon your orator complains and says that by the terms of said act of Congress approved July 2, 1864, your orator was authorized and empowered to lay out, locate, construct, furnish, maintain, and enjoy a continuous railroad and telegraph line, with the appurtenances, namely, beginning at a point on Lake Superior in

the State of Minnesota or Wisconsin, thence westerly by the most eligible route as should be determined by your orator within the United States on a line north of the forty-fifth degree of latitude to some point on Puget sound; and there was granted to your orator by the Congress of the United States of America every alternate section of public land, not mineral, designated by odd numbers to the amount of twenty alternate sections per mile on each side of said railroad line as your orator might adopt through the Territories of the United States and ten alternate sections of land per mile on each side of said railroad whenever it passed through any State and whenever on the line thereof the United States had full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption or other claims or rights at the time the line of said road should be definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office.

And your orator further shows that your orator duly accepted the terms, conditions, and impositions of said act and signified such acceptance in writing under the corporate seal of your orator, executed pursuant to the direction of its board of directors first had and obtained, and within two years after the passage of said act, to wit, December 29, 1864, served such acceptance on the President of the United States.

3 And your orator further shows that thereafter, to wit, May 26, 1873, your orator definitely fixed the line of its said railroad extending from Fargo to Bismarck, in the Territory of Dakota (now State of North Dakota), and filed a plat thereof in the office of the Commissioner of the General Land Office; that July 20, 1880, your orator definitely fixed the line of its said railroad extending from Bismarck to the Little Missouri river, in said Territory (now said State), and filed a plat thereof in the office of the Commissioner of the General Land Office; that said line of railroad so fixed extends opposite to and past the lands described in the schedules hereunto annexed, which schedules and the statements therein contained are made a part of this bill of complaint.

And your orator further shows that thereafter and before the 20th day of December, 1880, your orator had duly constructed and completed that portion of your orator's railroad and telegraph line extending on, over, and along the line of definite location of your orator's said railroad so fixed as aforesaid, and that the President of the United States had from time to time, as twenty-five or more continuous miles of said road were so completed, appointed three commissioners to examine the same, and, it appearing to said commissioners that such portions of your orator's said railroad and telegraph line had been completed in a good, substantial, and workmanlike manner as in all respects required by said act of July 2, 1864, and the acts supplementary thereto and amendatory thereof, the said commissioners so reported to the President of the United States, and the President of the United States on or before the said 20th day of December, 1880, duly accepted your orator's said line of railroad and telegraph so constructed and completed as aforesaid.

And your orator further shows that said lands and each and

every portion thereof are on and within forty miles of your orator's said line of railroad so definitely fixed as aforesaid, and that at the dates of the grant and of so definitely locating your orator's said line of railroad and of filing the plat thereof in the office of the Commissioner of the General Land Office, to wit, May 26, 1873, and July 20, 1880, the said described lands were public lands, to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, and there were at said dates no entries or filings or applications to make entry or filing of any nature whatsoever for said lands in the United States district land offices for the land districts in which said lands were situate or in the office of the Commissioner of the General Land Office, and that said lands were upon the records of said district land offices and of the office of the Commissioner of the General Land Office free from pre-emption or other claims or rights.

And your orator further shows that said lands have been surveyed by United States surveyors and have been reported by said surveyors to be non-mineral lands and agricultural in character, and that said lands were not July 2, 1864, or May 26, 1873, and July 20, 1880, known mineral lands, and no mineral other than coal or iron has ever been discovered upon or in said lands.

And your orator further shows that it has heretofore and prior to the year 1889, in accordance with the direction of the Secretary of the Interior, duly prepared and filed lists in the United States district land offices for the land districts within which such lands respectively are situate, describing said lands and claiming the same as a portion of the lands inuring to it under and by virtue of
4 said act of Congress approved July 2, 1864, and said lists were duly filed, allowed, accepted, and approved by said United States district land officers, and your orator duly paid to said United States district land officers all fees prescribed by law and to which they were entitled by reason of the listing of said lands and the filing, allowance, acceptance, and approval of said lists, and that no part of said fees have ever been returned to your orator, but the same have been retained by the United States.

And your orator further shows that thereafter the said United States district land officers duly transmitted said lists of land so filed as aforesaid to the Commissioner of the General Land Office, at Washington, D. C., for his approval.

And your orator further shows that since said lists were so filed and transmitted to the Commissioner of the General Land Office as aforesaid the said Commissioner of the General Land Office, under the direction of the Secretary of the Interior, has required your orator to file in the office of the Commissioner of the General Land Office or in the office of the United States land district in which such lands may be situate an affidavit made by some person acquainted with the character of said land, setting forth and showing that the same is non-mineral, and has refused to certify or approve for patent said lists until such affidavits shall first be filed by your orator; and the Secretary of the Interior and the President of the United States have refused to certify or patent said lands to your

orator or any part thereof, claiming and pretending that they are unable to ascertain or determine whether or not said lands are mineral in character.

And your orator further shows that none of said lands described in said schedules have ever been certified or patented to your orator, and neither the Government of the United States nor any of its officers or agents have ever ascertained or determined what specific lands in the State of North Dakota passed to your orator by virtue of said grant, although your orator has repeatedly asked and petitioned the said United States and its officers to determine the specific lands in said State of North Dakota that inure to your orator by virtue of said act of Congress and the joint resolutions and subsequent acts of Congress relating to the same subject-matter.

And your orator further shows that it has not, nor has any one in its behalf, filed such such affidavits by persons having knowledge of the mineral or non-mineral character of said lands, setting forth or showing that said lands are non-mineral in character.

And your orator further shows that the United States and its officers have failed and refused to certify said lands so described in said schedules under said grant to your orator or to certify any lands in said State of North Dakota to your orator, but have held and still hold the said lists suspended and unapproved for the reason that it is claimed that said lands may be mineral in character and, as such, excepted from the grant to your orator, or that said lands may not have been free from claims or rights at the date of said grant and of fixing the line of definite location opposite said lands; and the said question as to whether the title to said lands passed to your orator under and by virtue of said acts and joint resolutions of Congress and the compliance therewith by your orator is now in controversy and pending before the Commissioner of the General Land Office and the Secretary of the Interior.

And your orator further shows that the lands granted to your orator by the acts and joint resolutions aforesaid in said State of North Dakota have never been segregated from the public
5 lands and have never been identified, and the boundaries of the specific lands in said State so granted to your orator as aforesaid have never been ascertained or determined except as herein stated.

And your orator further shows that the said United States and its officers have not refused to certify or patent said lands or any lands in the State of North Dakota to your orator for any other reason than as hereinbefore stated, and that your orator has no other right, title, claim, interest, property, or possession in or to any of the lands or premises described in said schedules except such right, title, claim, interest, property, or possession as your orator may have obtained or secured under and by virtue of the said acts and joint resolutions of Congress and its compliance with the conditions thereof as aforesaid, and that said lands are, except for such right, title, claim, interest, and property as your orator may have obtained and secured under and by virtue of said acts and joint

resolutions and its compliance therewith as aforesaid, public lands of the United States.

And your orator further shows that thereafter, to wit, on the 7th day of March, A. D. 1889, the legislature of the Territory of Dakota passed an act, which was duly approved by the governor of said Territory, entitled "An act providing for the levy and collection of taxes upon the property of railroad companies in this Territory," in and by which it is, among other things, enacted and provided as follows, to wit:

"In lieu of any and all other taxes upon any railroads, except railroads operated by horse power, within this Territory, or upon the equipment, appurtenances, or appendages thereof, or upon any other property situated within this Territory belonging to the corporation owning or operating such railroads, upon the capital stock or business transactions of said railroad company, there shall hereafter be paid into the treasury of this Territory an amount equal to a percentage of all the gross earnings of the corporation owning or operating such railroad arising from the operation of such railroad as shall be situated within this Territory, both upon territorial and interstate traffic, in case the railroad company owning or operating such line shall accept and become subject to this act as hereinafter provided."

And your orator further shows that the said lands described in said schedules were at said date in said Territory of Dakota, and your orator owned and operated a railroad in said Territory prior to and during the year 1889 and until the admission of that portion of the Territory of Dakota which is now comprised in the State of North Dakota.

And your orator further shows that it did, within thirty days after the passage of said act, by resolution of its board of directors, attested by its secretary and filed with the secretary of the Territory of Dakota, accept and become subject to the provisions of said act, and prior to the acceptance of said act as aforesaid and within thirty days after the passage of said act of March 7, 1889, your orator, as required by said act, prepared and filed with the treasurer of said Territory, in the manner required by the provisions of chapter 99 of the Session Laws of the Territory of Dakota for the year 1883, an account of the gross earnings of your orator, both territorial and interstate, for the years 1887 and 1888, and paid into the treasury of said Territory the entire amount of taxes theretofore claimed by said Territory on local and interstate earnings, but remaining unpaid at the time of filing such account for the years 1886 and 1887, such payments being as follows, to wit, for the last half of the year 1886,
6 $38,095.31; for the year 1887, $65,585.46. Such sums so paid under the agreement and acceptance provided for in said act of congress (legislature of the Territory of Dakota) of March 7, 1889, were percentages computed entirely upon gross earnings of your orator derived from intrastate business, the percentage for said years computed upon the gross earnings of your orator derived from interstate business having been theretofore paid by your ora-

tor, as required by the provisions of said chapter 99 of the Session Laws of said Territory for the year 1883; and your orator further paid into the treasury of said Territory at said time one-half of the entire amount due, under the agreement and acceptance in said act referred to, for the year 1888, said amount so paid being $46,937.09, and that thereafter and on or before August 15, 1889, your orator further paid into said treasury the remainder of said amount due under said acceptance and agreement for the year 1888, to wit, $46,937.09. The said sums so paid into said treasury for the year 1888 were percentages computed upon gross earnings of your orator for said year 1888, derived from both interstate and intrastate business as follows, to wit: From interstate business, $82,427.40, and from intrastate business, $11,446.78. And your orator shows that each and every of said percentages derived from interstate business so paid into said treasury were not money due said Territory from your orator except by virtue of said act approved March 7, 1889, and the acceptance thereof by your orator, but were so paid to and received by said Territory as a consideration for the exemption from taxation provided by said act of March 7, 1889, and for no other reason, and were so paid under the agreement and acceptance in said act referred to.

And your orator further shows that, notwithstanding the premises, in the year 1889 the officers of said counties of Kidder, Stutsman, Richland, and McLean authorized by the laws of said Territory of Dakota to assess property therein for the purposes of taxation and to levy taxes thereon pretended to assess for the purposes of taxation and to levy taxes on the parcels of land in their respective counties more particularly described as follows, to wit, the lands in said Kidder county being particularly set forth and described in said Schedule "A," hereunto annexed; the lands in said Stutsman county being particularly set forth and described in Schedule "B," hereunto annexed; the lands in said Richland county being particularly set forth and described in Schedule "C," hereunto annexed, and the lands in said McLean county being particularly set forth and described in Schedule "D," hereunto annexed.

And your orator further shows that the said defendants, the county auditors of said counties, have advertised the said lands in their respective counties described in said schedules hereunto annexed for sale and threaten and are about wrongfully to sell the same for the non-payment of said pretended taxes, claimed to be delinquent, with the penalties and costs, on the 2nd day of December, 1889, and to issue certificates of sale for the same in the form prescribed by the laws of North Dakota, and the said defendants will, unless restrained by the order of this honorable court, so sell said lands and issue such certificates of sale, and thereby the rights of your orator in and to said lands will be irreparably injured and a multiplicity of suits concerning the title to said lands necessarily occasioned.

And your orator further shows that said taxes so assessed and levied upon said lands as aforesaid are a cloud upon the title of

your orator to said lands, and that the said certificates, when issued, will create and constitute a cloud upon the title of your orator in and to said lands.

7 And your orator further shows upon its information and belief that each and every of said counties is bankrupt, and that should your orator pay said taxes and bring an action against said counties to recover back the amount so paid for said taxes it will require a multiplicity of suits, and any judgments that may be recovered by your orator would be wholly unsatisfied and worthless.

And your orator further shows that the issues herein involved between your orator and each of said defendants depends upon precisely the same questions of law and upon the same facts, and that said pretended taxes are claimed by said defendants to have been all assessed and levied under and by virtue of the same statutes of the Territory of Dakota.

And your orator further shows that the amount of said taxes so levied upon the lands in said counties, together with the costs and penalties claimed by said counties to have accrued thereon and for which the said counties have advertised said lands for sale and threaten and are about to sell said lands, is respectively as follows: Upon the lands in said Kidder county, $12,820.67; upon the lands in said Stutsman county, $8,863.39; upon the lands in said Richland county, $4,094.37, and upon the lands in said McLean county, $4,048.17, the amount of such tax, penalty, and cost upon each tract of said land being particularly shown in the said schedules hereunto attached.

Forasmuch as your orator can have no adequate relief except in this court, and to the end, therefore, that the defendants may, if they can, show why your orator should not have the relief hereby prayed, and may make full disclosure and discovery of all the matters aforesaid, and according to the best and utmost of their knowledge, remembrance, information, and belief full, true, direct, and perfect answer make to the matters hereinbefore stated and charged, but not under oath, an answer under oath being hereby expressly waived;

And your orator prays that your honors may decree that the said pretended assessments and taxes so levied upon said lands and each of them are illegal and void and a cloud upon the title of your orator, and that said defendants and each of them, their deputies and successors in office, may be restrained from selling or attempting to sell said lands or any portion thereof or issuing any tax certificates therefor;

And your orator prays that your honors may grant a writ of injunction issuing out of and under the seal of this honorable court, perpetually enjoining and restraining said defendants, their deputies and successors in office, from selling or attempting to sell said lands for said pretended taxes as aforesaid and from maintaining and keeping said taxes upon the records of their offices as unpaid and delinquent taxes; and your orator further prays that a provisional or preliminary injunction be issued, restraining said defendants and

each of them from selling or attempting to sell or issuing certificates of sale for said lands pending this cause, and for such other and further relief as the equity of the case may require and to your honors may seem meet—

May it please your honors to grant unto your orator not only a writ of injunction conformable to the prayer of this bill, but also a writ of subpœna of the United States of America, directed to said defendants, A. G. Clark, county auditor of Kidder county, N. D.; W. M. Graves, county auditor of Stutsman county, N. D.; O. H. Perry, county auditor of Richland county, N. D., and C. T. Lange, county auditor of McLean county, N. D., commanding them on a day certain to appear and answer unto this bill of complaint and to abide and perform such order and decree in the premises as to the court shall seem proper and required by the principles of equity and good conscience.

F. M. DUDLEY.
Solicitor for Complainant.

8 STATE OF MINNESOTA, } ss:
County of Ramsey, }

Charles B. Lamborn, being first duly sworn, on oath doth depose and say that the above-named complainant is a corporation, and that he is an officer thereof, to wit, its land commissioner; that he has read the foregoing bill of complaint and knows the contents thereof, and the same is true to his best knowledge, information, and belief.

(Signed) CHAS. B. LAMBORN.

Subscribed and sworn to before me this 24th day of June, A. D. 1895.

(Signed) P. P. STARIN,
Notary Public, Ramsey County, Minn.

That thereafter the said defendants duly appeared and demurred to said amended bill of complaint, for that "it appeareth by the plaintiff's own showing by the said amended bill that it is not entitled to the relief prayed by the said amended bill."

That the said United States circuit court for the district of North Dakota sustained said demurrer and entered a decree in said cause dismissing said amended bill, from which said order sustaining said demurrer and said decree dismissing said amended bill the said Northern Pacific Railroad Company duly appealed to this court.

And the said United States circuit court of appeals for the eighth circuit further certifies that, to the end that it may properly decide the questions arising in said cause and presented by the assignment of errors therein filed, the said court desires the instructions of the Supreme Court of the United States upon the following questions and propositions of law, to wit:

9 First. Are the odd-numbered sections of land within the place limits of the grant to the Northern Pacific Railroad

Company by the act of Congress approved July 2, 1864, which were not and are not known to be mineral, and which were at the dates of the grant and of filing the map of definite location in the office of the Commissioner of the General Land Office lands not reserved, sold, granted, or otherwise appropriated, and for which there were at said dates no entries or filings or application- to make entry or filing of any kind of record in the United States district land offices for the districts in which such lands were situate or in the office of the Commissioner of the General Land Office so identified by these facts as granted lands, non-mineral, and free from claims or rights and so segregated from the public domain as to attach to the specific tracts the title vested in the railroad company by the grant of July 2, 1864, and render them taxable, said lands being unpatented and uncertified to the railroad company?

Second. Are the odd-numbered sections of land within the place limits of the grant to the Northern Pacific Railroad Company made by the act of Congress approved July 2, 1864, which have not been and are not known to be mineral, and which were at the date of the grant and at the date of filing the map of definite location in the office of the Commisioner of the General Land Office not reserved, sold, granted, or otherwise appropriated, and for which there were at said dates no entries or filings or applications to make entry or filing of any kind of record in the United States district office- for the districts in which such lands were situate or in the office of the Commissioner of the General Land Office, taxable by the States and Territories after the filing of the map of definite location of said railroad and a full compliance by said railroad company with the terms and conditions of the granting act, so long as the United States refuses to patent or certify such lands to the railroad company, for the reason that neither the United States nor its officers have ascertained or determined whether said lands are mineral or not or whether said lands were free from claims or rights at the date of said grant, and of fixing the line of definite location opposite said lands, and while the question whether the title to said lands passed by virtue of said grant to said grantee is in controversy and pending before the Interior Department upon undetermined questions of fact?

Third. Are the said lands taxable prior to the furnishing by the grantee of affidavits of their non-mineral character, such non-mineral affidavits having been required by the Interior Department as a condition precedent to the issuance of patents for or certification of said lands to said railroad company?

Fourth. Is chapter 107 of the Laws of Dakota for 1889, being an act entitled "An act providing for the levy and collection of taxes upon the property of railroad companies in this Territory," approved March 7, 1889, in conflict with section 8 of article I of the Constitution of the United States and void as a regulation of interstate commerce?

Fifth. Is chapter 107 of the Laws of Dakota for 1889, being an act entitled "An act providing for the levy and collection of
11 taxes upon the property of railroad companies in this Territory," approved March 7, 1889, in conflict with the Vth and XIVth amendments to the Constitution of the United States and void in so far as it attempts to exempt from taxation the lands granted by Congress by the act approved July 2, 1864, to aid in the construction of the Northern Pacific railroad?

Sixth. Is chapter 107 of the Laws of Dakota for 1889, being an act entitled "An act providing for the levy and collection of taxes upon the property of railroad companies in this Territory," approved March 7, 1889, in conflict with the organic act of the Territory of Dakota and void in so far as it attempts to exempt from taxation the lands granted by Congress by the act approved July 2, 1864, to aid in the construction of the Northern Pacific railroad?

Seventh. Is chapter 107 of the Laws of Dakota for 1889, being an act entitled "An act providing for the levy and collection of taxes upon the property of railroad companies in this Territory," approved March 7, 1889, to be construed as granting an exemption or commutation of taxation for and during the year 1889, or was such exemption or commutation to be in force and effect for and after the year 1890?

Eighth. Is said bill without equity because of the failure to aver that the complainant has tendered or paid the "gross-earnings percentage" for the year 1889, and is said complainant entitled to the equitable relief prayed without first tendering or paying such tax?

12 In witness whereof the undersigned judges, holding the said United States circuit court of appeals for the eighth circuit, have hereunto set their hands this fourth day of October, A. D. 1893, at St. Paul, Minnesota, and ordered and directed that the foregoing certificate be filed in said circuit court of appeals and by the clerk of said court duly forwarded to the Supreme Court of the United States.

WALTER H. SANBORN.
AMOS M. THAYER.

UNITED STATES OF AMERICA, *Eighth Circuit*, } *ss:*

I, John D. Jordan, clerk of the United States circuit court of appeal for the eighth circuit, do hereby certify that the foregoing certificate in the cause of Northern Pacific Railroad Company, appellant, *versus* A. G. Clark, county auditor of the county of Kidder, N. D., *et al.*, No. 337, May term, 1893, was duly filed and entered of record in my office by order of said court, and, as directed by said court, the said certificate is by me forwarded to the Supreme Court of the United States for its action thereof.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals for the eighth circuit, at the city of St. Paul, Minnesota, this ninth day of October, in the year of our Lord one thousand eight hundred and ninety-three, and of the Independence of the United States the one hundred and seventeenth.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

[Endorsed:] Filed Oct. 4, 1893. John D. Jordan, clerk.

Endorsed on cover: Case No. 15,429. U. S. circuit court of appeals, 8th circuit. Term No., 1045. The Northern Pacific Railroad Company, appellant, *vs.* A. G. Clark, county auditor of Kidder county, North Dakota, *et al.* Filed October 21st, 1893.

Office Supreme Court U. S.
FILED.
FEB 6 1894
JAMES H. McKENNEY,
CLERK.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

NO. 1045.

NORTHERN PACIFIC RAILROAD COMPANY,
Appellant,

vs.

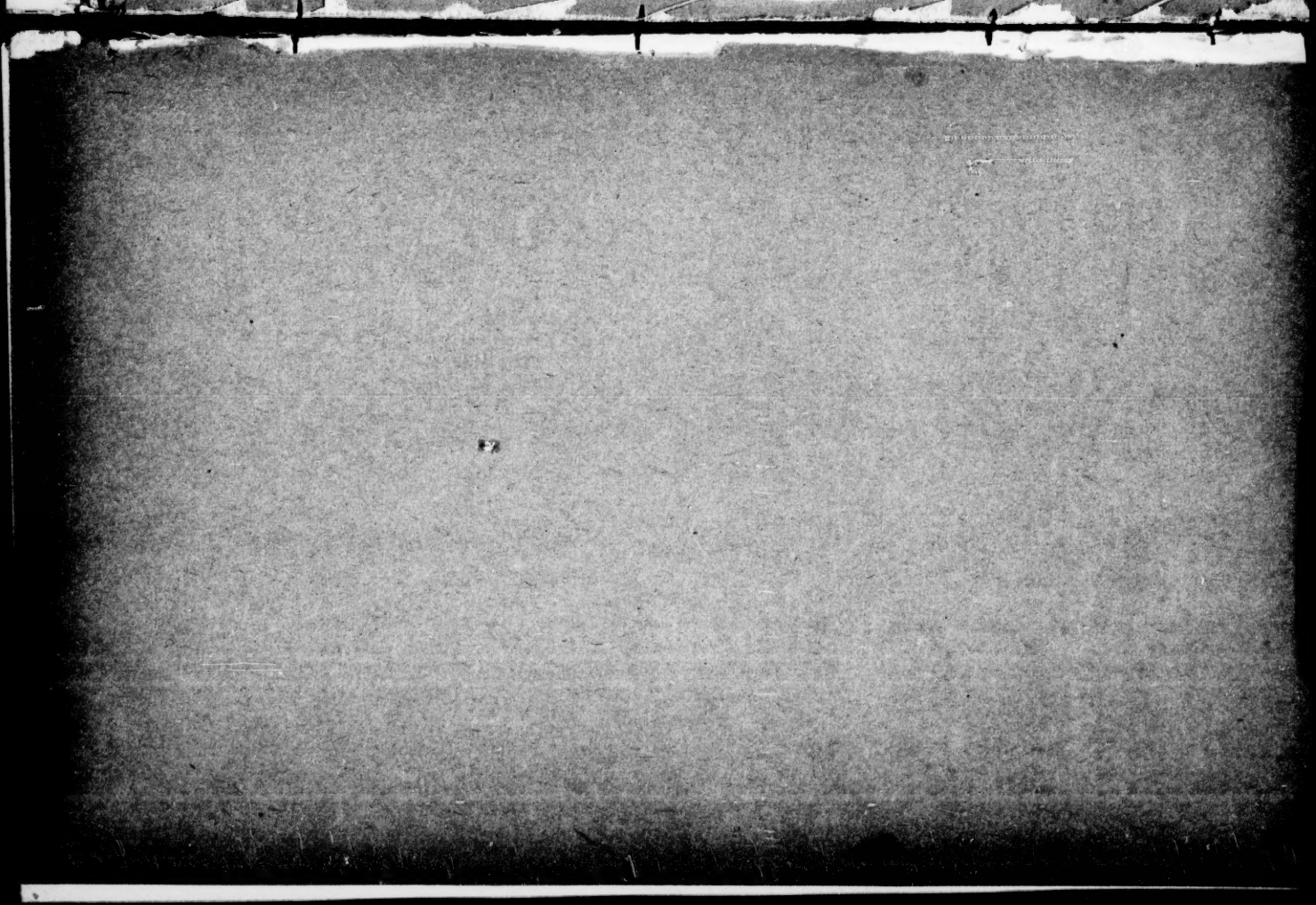
A. G. CLARK, County Auditor of Kidder County, N. D., et al.,
Appellees.

CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Argument for Appellant.

Fred M. Dudley,
Counsel for Appellant.

(15,429)



IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

NO. 1045.

NORTHERN PACIFIC RAILROAD COMPANY,
Appellant,

vs.

A. G. CLARK, COUNTY AUDITOR OF KIDDER COUNTY, N. D., ET AL.,
Appellees.

CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Argument for Appellant.

STATEMENT OF CASE.

The action as originally commenced included as defendants all of the counties in Dakota territory wherein appellant had lands of the value of over $5,000; but this court holding that the jurisdiction of the federal court depended upon the amount of the tax levied, which the bill did not show, remanded the case that the bill might be amended in this particular, if the facts justified such amendment.

N. P. R. R. Co. v. Walker, et al., 148 U.S. 391.

The circuit court granting permission, the bill was amended in this and some other respects. The amount of the taxes in some of said counties being below the jurisdictional amount, and said suit having been compromised in others, but four of the counties remain as defendants in the amended bill.

This action is brought by complainant below (appellant here) against the county auditors of four counties in North Dakota to obtain a decree declaring that the assessments and taxes levied for the year 1889 upon the portion of the lands granted to complainant by the act of congress approved July 2, 1864, situated in said counties, were illegally levied, and are void and a cloud upon complainant's title to such lands; and to restrain the several county auditors from selling or attempting to sell said lands for said taxes, or issuing tax certificates therefor, and from maintaining and keeping said taxes upon the records of their offices as unpaid and delinquent.

The amended bill alleges, in substance, the incorporation of complainant; its acceptance of the act of incorporation; the fixing of the line of definite location of complainant's railroad opposite to and past the lands involved; the construction and completion of the railroad and telegraph line as required by the act of congress; and the examination and acceptance thereof by the commissioners appointed by the president. That the lands involved are on and

within forty miles of the line of the road as definitely fixed; and were, at the date of the grant and at the time of fixing such line of definite location, "public lands to which the United States had full title, not reserved, sold, granted or otherwise appropriated, and there were at said dates, no entries or filings, or applications to make entry or filing, of any nature whatsoever, for said lands in the United States district land offices for the land districts in which said lands were situate, or in the office of the commissioner of the general land office; and that the said lands were, upon the records of said district land offices, and of the office of the commissioner of the general land office, free from pre-emption or other claims or rights." It further alleges, in lieu of an allegation that the lands are non-mineral, that they have been surveyed, and "have been reported by said surveyors to be non-mineral;" that they were not, at the dates of the grant and of definitely fixing the line of the road "known mineral lands," and that "no mineral, other than coal or iron, has ever been discovered upon or in said lands." It avers that complainant has duly listed the lands with the proper United States district land officers, paying the fees therefor, which fees have been retained by the United States, and that said lists were "duly filed, allowed, accepted and approved by said United States district land officers;" that said lists were transmitted to the commissioner

of the general land office for his approval; that after the filing and transmission of said lists to the commissioner, the interior department required, as a condition precedent to the issuance of patents, the filing of an affidavit by some person acquainted with the character of the lands, setting forth that the same were non-mineral; and that the department has failed and refused to certify or patent the lands to the railroad company, claiming to be unable to determine their character, whether mineral or not; that the company has refused to file the non-mineral affidavits required. That although the railroad company has repeatedly asked and petitioned for the identification of its grant, none of the lands involved have been certified or patented to it; and that the United States has never ascertained or determined which specific tracts of land inure to the railroad company under its grant. That the United States has failed and refused to certify the lands involved to complainant, but has held, and holds, the lists suspended and unapproved for the reason that it is claimed the lands may be mineral in character, and, as such, excepted from the grant, or may not have been free from claims or rights at the dates of the grant and definite location; and the question whether the title to these lands passed to the company under the grant, is now in controversy, pending before the department. That the lands in North Dakota granted to

complainant have never been segregated from the public domain, and have never been identified, and that their boundaries have never been ascertained or determined, except as stated in the bill. That the United States has refused to certify or patent the lands for no other reason than complainant's failure to file the required non-mineral affidavits, and the doubt as to whether the specific tracts passed under the grant. That complainant has no other right, title, claim, interest, property or possession of, in, or to the lands involved, than it acquired under the act of congress and its compliance therewith as stated in the bill; and that except for such right, title, claim, interest and property, the lands are public lands of the United States.

The bill then avers the passage of an act by the legislature of the territory of Dakota, approved March 7, A. D. 1889, providing for the payment by railroad corporations, except those operating railroads by horse power, of an amount equal to a certain percentage of their gross earnings, in lieu of any and all other taxes upon any and all other property of such corporations, situate within the territory. It avers the existence of the conditions necessary to enable complainant to avail itself of the terms of this act and obtain the exemption from taxation for all of its property, including these lands, proffered by the act; the acceptance of the act and compliance with all the conditions

precedent to obtaining the benefits tendered, including the payment of large sums of money.

The bill then sets up that, notwithstanding the exemption of these lands from taxation, arising from the alleged facts, the respective officers of the counties wherein the lands were situated, assessed said lands and levied taxes thereon; and that the defendants, the county auditors, have advertised the lands for sale to satisfy said taxes, and will sell the same unless enjoined by the court; the amount of said taxes being shown as follows: In Kidder county, $12,820.67; Stutsman county, $8,863.39; in Richland county, $4,094.37; in McLean county, $4,048.17. That the taxes are a cloud upon complainant's title, and the certificates of sale will constitute a further cloud; that the counties are bankrupt; and that the sale of these lands will cause a multiplicity of suits and will work irreparable injury to complainant's rights therein.

To this amended bill the several defendants demurred, for that "it appeareth by the plaintiff's own showing by the said amended bill that it is not entitled to the relief prayed for by the said amended bill." The demurrers having been submitted, were sustained, and a decree entered dismissing complainant's bill. No opinion was rendered, the views of the court having been expressed upon the principal questions involved, in the opinion upon the demurrer to the original bill. The

opinion of the court in said cause is reported in 47 Federal Reporter, page 81. From the order sustaining said demurrers, and from said decree, the complainant appealed to the United States circuit court of appeals for the eighth circuit. And that court, after consideration, certifies the following questions arising upon the record for instruction by this court.

QUESTIONS.

I.

Are the odd numbered sections of land within the place limits of the grant to the Northern Pacific Railroad Company by the act of congress approved July 2, 1864, which were not, and are not, known to be mineral, and which were, at the dates of the grant and of filing the map of definite location in the office of the commissioner of the general land office, lands not reserved, sold, granted, or otherwise appropriated, and for which there were at said dates no entries or filings, or applications to make entry or filing of any kind, of record in the United States district land offices for the districts in which such lands were situate, or in the office of the commissioner of the general land office, so identified by these facts as granted lands, non-mineral, and free from claims or rights, and so segregated from the public domain, as to attach to the specific tracts the title vested in the railroad company by the grant of July 2, 1864, and render them taxable, said lands being unpatented and uncertified to the railroad company.

II.

17 Are the odd numbered sections of land within the place limits of the grant to the Northern Pacific Railroad Company made by the act of congress approved July 2, 1864, which have not been, and are not,

known to be mineral, and which were, at the date of the grant and at the date of the filing the map of definite location in the office of the commissioner of the general land office, not reserved, sold, granted, or otherwise appropriated, and for which there were at said dates no entries or filings or applications to make entry or filing of any kind, of record in the United States district land offices for the districts in which such lands were situate, or in the office of the commissioner of the general land office, taxable by the states and territories after the filing of the map of definite location of said railroad, and a full compliance by said railroad company with the terms and conditions of the granting act, so long as the United States refuses to patent or certify such lands to the railroad company for the reason that neither the United States nor its officers have ascertained or determined whether said lands are mineral or not, and whether said lands were free from claims or rights at the date of said grant and of fixing the line of definite location opposite said lands; and while the question whether the title to said lands passed by virtue of said grant to said grantee, is in controversy and pending before the interior department upon undetermined questions of fact?

III.

Are the said lands taxable prior to the furnishing by the grantee of affidavits of their non-mineral character, such non-mineral affidavits having been required by the interior department as a condition precedent to the issuance of patents for, or certification of, said lands to said railroad company?

IV.

Is chapter 107 of the Laws of Dakota, for 1889, being an act entitled "An act providing for the levy and collection of taxes upon the property of railroad companies in this territory," approved March 7, 1889, in conflict with section 8 of article I of the constitution of the United States, and void as a regulation of interstate commerce?

V.

Is chapter 107 of the Laws of Dakota for 1889, being an act entitled "An act providing for the levy and collection of taxes upon the property of railroad companies in this territory," approved March 7, 1889, in conflict with the Vth and XIVth amend-
18 ments to the constitution of the United States, and void in so far as it attempts to exempt from taxation the lands granted by congress by the act approved July 2, 1864, to aid in the construction of the Northern Pacific Railroad?

VI.

Is chapter 107 of the laws of Dakota for 1889, being an act entitled "An act providing for the levy and collection of taxes upon the property of railroad companies in this territory," approved March 7, 1889, in conflict with the organic act of the territory of Dakota, and void in so far as it attempts to exempt from taxation the lands granted by congress by the act approved July 2, 1864, to aid in the construction of the Northern Pacific Railroad?

VII.

Is chapter 107 of the Laws of Dakota, being an act entitled "An act providing for the levy and collection of taxes upon the property of railroad companies in this territory," approved March 7, 1889, to be construed as granting an exemption or commutation for and during the year 1889, or was such exemption or commutation to be in force and effect for and after the year 1890?

VIII.

Is said bill without equity because of the failure to aver that the complainant has tendered or paid the "gross-earnings tax" for the year 1889; and is said complainant entitled to the equitable relief prayed without first tendering or paying such tax?

ARGUMENT.

I.

ARE THE ODD NUMBERED SECTIONS OF LAND WITHIN THE PLACE LIMITS OF THE GRANT TO THE NORTHERN PACIFIC RAILROAD COMPANY BY THE ACT OF CONGRESS APPROVED JULY 2, 1864, WHICH WERE NOT, AND ARE NOT, KNOWN TO BE MINERAL, AND WHICH WERE, AT THE DATES OF THE GRANT AND OF FILING THE MAP OF DEFINITE LOCATION IN THE OFFICE OF THE COMMISSIONER OF THE GENERAL LAND OFFICE, LANDS NOT RESERVED, SOLD, GRANTED OR OTHERWISE APPROPRIATED, AND FOR WHICH THERE WERE, AT SAID DATES, NO ENTRIES OR FILINGS, OR APPLICATIONS TO MAKE ENTRY OR FILING, OF ANY KIND, OF RECORD IN THE UNITED STATES DISTRICT LAND OFFICES FOR THE DISTRICTS IN WHICH SUCH LANDS WERE SITUATE, OR IN THE OFFICE OF THE COMMISSIONER OF THE GENERAL LAND OFFICE, SO IDENTIFIED BY THESE FACTS AS GRANTED LANDS, NON-MINERAL AND FREE FROM CLAIMS OR RIGHTS, AND SO SEGREGATED FROM THE PUBLIC DOMAIN, AS TO ATTACH TO THE SPECIFIC TRACTS THE TITLE VESTED IN THE RAILROAD COMPANY BY THE GRANT OF JULY 2, 1864, AND RENDER THEM TAXABLE, SAID LANDS BEING UNPATENTED AND UNCERTIFIED TO THE RAILROAD COMPANY?

The question plainly relates to lands coterminous with constructed sections of the road, where the company has fully complied with the conditions precedent to the acquisition of title to the lands granted it by the act of congress approved July 2, 1864; and the only doubt as to their taxability arises from the doubt whether

the facts recited sufficiently show them to be the lands granted. The solution of this doubt, the answer to the question of the court, must be found by an analysis of the terms of the granting act. The material portion of the act of July 2, 1864, to be considered is:

"Sec. 3. *And be it further enacted*, that there be, and hereby is granted to the 'Northern Pacific Railroad Company, its successor and assigns, * * * every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated and free from pre emption or other claims or rights at the time the line of said road is definitely fixed and a plat thereof filed in the office of the commissioner of the general land office; and whenever prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the secretary of the interior, in alternate sections and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections. * * *

Provided further, that all mineral lands be, and the same are hereby excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd numbered sections, nearest to the line of said road, may be selected as above provided: *And provided further*, that the word 'mineral' where it occurs in this act shall not be held to include iron or coal."

That this act makes a grant *in praesenti* is well settled. But as the very basis of our con-

tention is found in the peculiar manner in which the title granted attaches itself to the particular tracts of land granted, I desire to direct attention to the language of this act. The words "there be, and hereby is, granted" to the company the sections designated, imply that the property itself is passed, not any special or limited interest in it. The title transferred is the legal, as distinguished from the equitable title. The words also import the transfer of a present title, not a promise to transfer one in the future. The act consequently vested in the grantee the legal title to the lands granted *eo instanti* July 2, 1864, subject to the performance of certain conditions subsequent. No specific lands, however, are described in the act, but means are provided for their future ascertainment; and, consequently, although the legal title to some lands, somewhere, vested in the grantee July 2, 1864, it could not be said of any particular tract, it is the property of the railroad company. To perfect the grant it is necessary to ascertain and determine the particular tracts falling within the terms of the granting act, but as soon as any particular tract is ascertained to be within the terms of the granting act it is then ascertained and determined that the railroad company has held the legal title to that specific piece of land ever since the 2nd day of July, 1864. This I understand to be the meaning of a float grant *in*

praesenti such as is made by the Northern Pacific act and similar legislation.

St. P. & P. R. R. Co. v. *N. P. R. R. Co.*, 139 U. S. 1, 5.

Deseret Salt Co. v. *Tarpey*, 142 U. S. 241, 247.

U. S. v. *S. P. R. R. Co.*, 146 U. S. 570, 593-4.

Curtner v. *U. S.*, 149 U. S. 662, 675.

Wis. Cen. R. R. Co. v. *Price Co.*, 133 U. S. 496, 509.

L. L. & G. R. R. Co. v. *U. S.*, 92 U. S. 733, 741.

Wineman v. *Gastrell*, 2 U. S. App. 449, 467.

The company has had, therefore, the legal title to some lands since the date of the grant, but that title is potential merely as to each tract, until the specific tract is ascertained to be within the grant. And admitting, as the question does, that the line of the road has been definitely fixed, the lands surveyed, and the grant fully earned, yet if for any reason the acts necessary to bring about these results do not determine conclusively with reference to any specific tract of land that that tract is granted, in other words, identify it, the grantee's title to that specific tract is not perfect. It remains contingent; its interest is a potential one merely until the identification is made, or susceptible of being made from determined facts.

The lands granted by the act of July 2, 1864, are confined to the following:

1. To public lands on and within forty miles of the line of definite location of the road in the territories, and within twenty miles of such line in the states.

2. To the public lands included within odd numbered sections.

3. To the public lands to which the United States has full title, not reserved, sold, granted or otherwise appropriated at the time the line of said road is definitely fixed and a plat thereof filed in the office of the commissioner of the general land office.

4. To the public lands that are free from pre-emption or other claims or rights at the time the line of said road is definitely fixed and a plat thereof filed in the office of the commissioner of the general land office.

5. To the public lands that are not mineral.

The legal title to all lands falling within these conditions has been vested in the railroad company since July 2, 1864. But until it is determined by the proper authority, or is susceptible of ascertainment from known and settled facts, that a certain tract of land does fall within these conditions, that particular tract is not, and cannot, be shown or known to be granted; it is not identified as a portion of the grant. If the line of the road has not been fixed, or if the lands have not been surveyed,

the lack of identity is at once apparent and will be conceded. But, since it is quite as essential that the lands to be granted shall be non-mineral, and shall be lands to which the United States has full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights at the date of the grant and at the time the line of said road is definitely fixed and a plat thereof filed in the office of the commissioner of the general land office, as it is that they should be odd numbered sections, or within the prescribed distance from the road, the determination of these questions, or their susceptibility of determination from known and settled facts, is quite as necessary for the identification of lands as within the grant, as is the definite location of the line of the road or a survey of the lands. If the line of the road has not been fixed, or the lands are unsurveyed, or there are adverse claims to the land, resting upon undetermined and undeterminable questions of fact, the land cannot be fully identified as within the grant. The company cannot be said to be the absolute owner of the particular lands, for the grant, as far as each specific tract is concerned, remains a float, and the title is potential, until the facts necessary to determine if it be granted, are settled and known.

Grant v. *I. R. R. L. Co.*, (Ia.) 7 N. W. Rep. 113.

Doe v. *I. R. R. L. Co.*, (Ia.) 7 N. W. Rep. 118.
C. P. R. R. Co., v. *Howard*, 52 Cal. 227, 231.
Curtner v. *U. S.*, 149 U. S. 662, 674.
Veeder v. *Guppy*, 3 Wis. 502, 525.
Kirby v. *Lewis*, 39 Fed. Rep. 66, 73.
Wright v. *Roseberry*, 121 U. S. 488, 509.

The certified question admits: (1) that the line of the road has been fixed and that the lands are on and within the prescribed distance therefrom; (2) that the surveys have been made and that the lands are parts of odd numbered sections; (3) that they are lands to which the United States had full title, not reserved, sold, granted or otherwise appropriated at the date of the grant and at the time the line of said road was definitely fixed and a plat thereof filed in the office of the commissioner of the general land office; (4) that there were, at the date of the grant and at the time the line of said road was definitely fixed and a plat thereof filed in the office of the commissioner of the general land office, no entries or filings or applications to make entry or filing, of any kind, for such lands, of record in the United States district land offices for the districts in which such lands were situate, or in the office of the commissioner of the general land office; and (5) that they were not, and are not, known to be mineral.

Assuming these facts, are they sufficient to establish that the lands described fall within

the conditions prescribed in the granting act, and which have been enumerated? Or, in other words, do they so fix the status of the title of such lands with reference to the grant that the question whether they are granted is susceptible of determination by the courts or individuals? If they do, then the lands are identified, and so far as this question is concerned, are taxable; if they do not, the lands are not identified, and are not taxable. The only doubt as to whether the admitted conditions surrounding these lands are the conditions which must surround lands to constitute them granted lands, must arise in determining, *first*, whether the admitted condition of the lands, that there were, at the date of the grant and at the time the line of the road was definitely fixed and a plat thereof filed in the office of the commissioner of the general land office, no entries or filings or applications to make entry or filing, of any kind, for such lands, of record in the United States district land offices for the districts in which such lands were situate, or in the office of the commissioner of the general land office, is equivalent to the required condition that the lands should, at these dates, be free from pre-emption or other claims or rights? Or, in other words, whether it is possible for the railroad company, or the taxing officials of the municipality, or for the courts, to determine, under the law, in advance of the determination by the interior

department, finally and with conclusive effect, under the admitted conditions, if the lands were, at the dates of the grant and of definite location, free from pre-emption or other claims or rights, so as to comply with the conditions of the grant? *Second*, whether the admitted condition that these lands were not and are not *known* to contain mineral, is equivalent to the required condition that they be not mineral? These questions will be considered in their order.

1. IS THE ADMITTED CONDITION OF THE LANDS WITH REFERENCE TO FREEDOM FROM CLAIMS OR RIGHTS, EQUIVALENT TO THE REQUIRED CONDITION THAT THEY SHOULD BE, AT THE DATES OF THE GRANT AND OF DEFINITE LOCATION, FREE FROM PRE-EMPTION OR OTHER CLAIMS OR RIGHTS?

The assumed condition as to freedom from pre-emption or other claims or rights, amounts simply to this: That so far as appears from the records, the lands were free from pre-emption or other claims or rights. If a claim or right sufficient to bring land within the exception can only be initiated by a proceeding in the proper land office, where it would become a matter of record and notice to the world, defining beyond controversy the land claimed, and attaching the claim thereto, the admitted condition is equivalent to the required condition.

And it must be admitted that in *K. P. Ry. Co.* v. *Dunmeyer*, 113 U. S. 629, this court apparently so decided. The court there says:

"This filing of the map of definite location furnished also the means of determining what lands had previously to that moment been sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim had attached; for, *by examining the plats of this land in the office of the register and receiver or in the general land office, it could readily have been seen if any of the odd sections within ten miles of the line had been sold or disposed of, or reserved, or a homestead or pre-emption claim had attached to any of them.* In regard to all such sections, they were not granted. The express and unequivocal language of the statute is that the odd sections *not* in this condition are granted." Page 640.

Again:

"Of all the words in the English language, this word 'attached' was probably the best that could have been used. It did not mean mere settlement, residence or cultivation of the land, but *it meant a proceeding in the proper land office* by which the inchoate right to the land was initiated." Page 644.

And when the courts have had occasion to touch this question they have uniformly announced a similar doctrine.

B. & M. R. R. Co. v. *Abink*, 14 Neb. 97; 15 N. W. Rep. 317.

W. P. R. R. Co. v. *Teris*, 41 Cal. 489, 493.

S. P. R. R. Co. v. *Pursell*, (Cal.) 18 Pac. Rep. 886.

A. T. & S. F. Ry. Co. v. *Mecklim*, 23 Kan. 167, 174.

I. R. R. L. Co. v. *Adkins*, 38 Ia. 351, 354-5.

Kiteringham v. *Blair, etc.*, (Ia.) 35 N. W. Rep. 502, 503.

Cahalan v. *McTague*, 46 Fed. Rep. 251.

Water & Mining Co. v. *Bugbey*, 96 U. S. 165.

Brown v. *Corson*, (Or.) 19 Pac. Rep. 66, 70.

Buxton v. *Traver*, 130 U. S. 232.

N. P. R. R. Co. v. *Wright*, 54 Fed. Rep. 67, 69.

Such, however, is not the law as laid down by the interior department, upon which it acts in the adjustment of these grants, and by which it is governed in determining contests between settlers and the railroad companies. And for the purpose of this action we shall assume that the rule by which that department determines the company's claim to lands, and patents—or refuses to patent—the same, is the law. According to the departmental construction of the phrase "free from pre-emption or other claims or rights," something more is required to determine the status of the lands than a mere reference to an examination of the records of the land office. The law, as there determined, is that occupation of land by a qualified entryman, existing at the date of the grant or at the date the map of definite location is filed, without a filing thereon or entry thereof, or any proceeding in the land office whatsoever, or any record evidence of its existence, is sufficient to bring the lands within the description of "not free from pre-emption or other claims or rights."

Trepp v. *N. P. R. R. Co.*, 8 Copp's L. O. 181.

St. P. M. & M. Ry. Co. v. *Gjuve*, 1 L. D. 331.
Emmerson v. *C. P. R. R. Co.*, 3 L. D. 117, 271.
T. & P. R. R. Co. v. *Gray*, 3 L. D. 253.
Pointard v. *C. P. R. R. Co.*, 4 L. D. 353.
Ramage v. *C. P. R. R. Co.*, 5 L. D. 274.
Brown v. *C. P. R. R. Co.*, 6 L. D. 151.
N. P. R. R. Co. v. *Bowman*, 7 L. D. 238.
N. P. R. R. Co. v. *Anrys*, 8 L. D. 362.
C. P. R. R. Co. v. *Shepherd*, 9 L. D. 213.
N. P. R. R. Co. v. *Anrys*, 10 L. D. 258.
N. P. R. R. Co. v. *Kerry*, 10 L. D. 290.
N. P. R. R. Co. v. *Potter*, 11 L. D. 531.
N. P. R. R. Co. v. *McCrimmon*, 12 L. D. 554.
Irvine v. *N. P. R. R. Co.*, 14 L. D. 362.
N. P. R. R. Co. v. *Patterson*, 16 L. D. 343.

In order that such settlement shall constitute a claim or right sufficient to exclude the land from the grant, however, it is necessary that the settler be qualified to enter the land under the public land laws.

McComber v. *C. & O. R. R. Co.*, 2 Copp's L. O. 163.
Weber v. *W. P. R. R. Co.*, 6 Copp's L. O. 19.
Perkins v. *C. P. R. R. Co.*, 1 L. D. 336.
Emmerson v. *C. P. R. R. Co.*, 3 L. D. 271.
Ramage v. *C. P. R. R. Co.*, 5 L. D. 274.
C. P. R. R. Co. v. *Painter*, 6 L. D. 485.
N. P. R. R. Co. v. *Fitzgerald*, 7 L. D. 228.
C. P. R. R. Co. v. *Rees*, 10 L. D. 281.
Titamore v. *S. P. R. R. Co.*, 10 L. D. 463.
N. P. R. R. Co. v. *Potter*, 11 L. D. 531.

Stewart v. *N. P. R. R. Co.*, 11 L. D. 568.
N. P. R. R. Co. v. *McCrimmon*, 12 L. D. 554.
Irvine v. *N. P. R. R. Co.*, 14 L. D. 362.
N. P. R. R. Co. v. *Stark*, 15 L. D. 53.
Degenhart v. *N. P. R. R. Co.*, 15 L. D. 159.

The settler must not only be a qualified entryman, but he must have made his settlement with the intention of entering the land.

S. P. R. R. Co. v. *Lopez*, 3 L. D. 130.
Link v. *U. P. R'y Co.*, 6 L. D. 322.
N. P. R. R. Co. v. *Dunham*, 11 L. D. 471.
N. P. R. R. Co. v. *Pile*, 12 L. D. 323.
Degenhart v. *N. P. R. R. Co.*, 15 L. D. 159.
Tetreault v. *N. P. R. R. Co.*, 15 L. D. 552.

But such settlement, even if made the very date of the grant or the same day that the map of definite location is filed, is sufficient to prevent the land passing under the grant.

St. P. M. & M. Ry' Co. v. *Gjure*, 1 L. D. 331.
N. P. R. R. Co. v. *Parker, et al.*, 2 L. D. 569.
Mattson v. *St. P. M. & M. R'y Co.*, 5 L. D. 356.
N. P. R. R. Co. v. *Flaherty*, 8 L. D. 542.

And since the grant is *in praesenti*, and the time sharply fixed, to-wit: the dates of grant and of filing the map of definite location, when the existing status of the land must determine whether it is granted or not, the abandonment of the land by the settler at any time after those dates, does not restore the land to the grant, but restores it to the public domain of the United States.

Bardon v. *N. P. R. R. Co.*, 145 U. S. 535, 545.
L. L. & G. R. R. Co. v. *U. S.*, 92 U. S. 733, 749.
Newhall v. *Sanger*, 92 U. S. 761.
K. P. R'y Co. v. *Dunmeyer*, 113 U. S. 640, 641.
Perkins v. *C. P. R. R. Co.*, 1 L. D. 336.
Ramage v. *C. P. R. R. Co.*, 5 L. D. 274.
C. P. R. R. Co. v. *Painter*, 6 L. D. 485.
N. P. R. R. Co. v. *Johnson*, 7 L. D. 357.
N. P. R. R. Co. v. *Flaherty*, 8 L. D. 542.
S. P. R. R. Co. v. *Brown*, 9 L. D. 173.
N. P. R. R. Co. v. *Kerry*, 10 L. D. 290.

In order, therefore, that a tract of land shall be free from pre-emption or other claims or rights so as to pass by the grant, it is necessary either that there should be no settler upon it at the dates of the grant and of definite location, or, if such settler was there, that he was not qualified to enter the same under the public land laws, or had no intention of so doing. And to identify a tract of land as within the grant, that is, to show it to be the same with the lands granted by the act, it is essential that these facts, if such be the facts, with reference thereto, be shown, or at least be susceptible of being established before some competent tribunal whose decision thereon is conclusive as between the United States and the railroad company. The *facts* necessary to determine whether the lands were free from claims or rights actually exist, since the status of the

lands at the dates of the grant and of definite location is a thing of the past. But are those facts susceptible of being definitely and finally established? Since it is the condition of the land at a definite date that is the test, a change in that condition the day following is immaterial; thus, if a qualified settler settled upon a tract of land the day preceding the date of the grant, twenty-nine years ago, or the date of the definite location of the road, land perhaps in the wilderness and unsurveyed, with the intention of making his home there and ultimately entering the land under the public land laws, an act and intention probably known only to himself, and resided there but two days and then abandoned the land, it would not be within the conditions prescribed in the grant and would not be granted. But there is no presumption of law, and certainly none of fact, that the railroad company has knowledge of these things so as to know whether each particular tract was granted or not. It cannot be presumed to know of every settler on lands that were afterward shown to be odd numbered sections within the limits of the grant, who chanced to occupy such lands July 2, 1864, or at the date of the filing of the plat of definite location in the office of the commissioner of the general land office, and to know not only of his settlement, but also to know his qualifications for entering the lands, and his intentions with reference

thereto. Such knowledge is an impossibility. And since knowledge of these things is necessary to knowledge of what lands are granted, it is not to be presumed that the railroad company has knowledge of what specific lands are granted, or can identify in the whole mass of odd numbered sections, the particular tracts to which it has title. Such knowledge is equally an impossibility in others. And since the title to all tracts that were not free from claims or rights remains in the United States, the government has, by virtue of its ownership of such unknown tracts scattered through the great mass of odd numbered sections, a potential interest in the entire mass. Since the survey determines merely what are the odd numbered sections within the limits of the grant, but does not, and cannot, determine which of the odd numbered sections were free from claims or rights, the relationship of the government and the company to each other, with reference to these odd numbered sections, remains of the same nature that it was with respect to the entire mass of lands within the granted limits prior to survey. The survey is one step towards the identification, but since it fails to complete that identification it does not alter the nature of the interest of the government in the land.

It may be claimed that the survey of the lands renders it possible, by pointing out what are odd numbered sections, to collect all the facts with reference to any particular tract

and so determine whether it was free from claims or rights at the necessary dates. A moment's reflection will show this impossible. The greater portion of this land was a wilderness. It was unsurveyed. Hundreds of settlers were on it of whose settlements no knowledge existed save in themselves: with their removal all evidence of their settlement vanished, save, perhaps, a mouldering cabin. What became of the settlers no man knew. What their intentions in making the settlements were, they alone could tell. If the lands were unsurveyed, not even they could tell the precise lands they claimed, without a return to the lands and an examination of the survey lines. The records of the interior department conclusively establish that the evidence to prove a settlement, even where evidence be secured, is frequently, even generally, conflicting and obscure. The all important dates are forgotten, the witness is uncertain, is contradicted by equally positive and reliable witnesses. To determine these facts is a judicial function. This function cannot be performed by a private individual, without process and without the means of procuring the testimony of unwilling witnesses. Nor is it, by any law, made the duty of the railroad company to attempt to exercise this function and determine for itself and at peril of having its lands sold, what was free from claims or rights years ago, and what was not.

Not only is it impossible for the railroad company or others to conclusively determine these questions, but the law does not provide a forum in which the railroad company can proceed to have these questions finally determined with reference to specific lands, and so cut off the interest of the government therein. By the fourth section of the act of July 2, 1864, congress, among other things, provides:

"Sec. 4. *And be it further enacted*, That whenever said 'Northern Pacific Railroad Company' shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the president of the United States shall appoint three commissioners to examine the same, and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial and workmanlike manner, as in all other respects required by this act, the commissioners shall so report to the president of the United States, and patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands, situated opposite to and coterminous with said completed section of said road; and, from time to time, whenever twenty five additional consecutive miles shall have been constructed, completed and in readiness as aforesaid, and verified by said commissioners to the president of the United States, then patents shall be issued to said company conveying the additional sections of land as aforesaid, and so on as fast as every twenty-five miles of said road is completed as aforesaid."

Under this section it is clearly the duty of the officers authorized to issue patents, to ascertain, prior to the issuance of such patents, what portions of the lands coterminous with the completed sections of the road fall within the terms

of description contained in the granting act, and, hence, are patentable.

Cowell v. *Lammers*, 21 Fed. Rep. 200, 205.

And this duty and consequent power to determine, as against the government, what lands are granted, is exclusive. To determine whether a specific tract passed under the grant to appellant, or whether it remains a part of the unappropriated public lands of the United States, requires the examination and construction of the acts of congress touching the public lands; and of the acts done and work of construction performed by appellant; and of the history of the particular tract of land; and the performance of these duties is entrusted, by the act of congress, in the first instance, to the interior department; and the courts will not in any manner interfere with, or seek to control in advance and direct, the action of that department in the performance of those duties. The courts have always refused to take jurisdiction of matters pending before the department, unless it be to protect private rights from being defeated and destroyed by the failure and neglect of the department to perform its duties.

S. C. & St. P. R. R. Co. v. *U. S.* 34 Fed. Rep. 835, 837.

Chandler v. *C. & H. Min. Co.*, 149 U. S. 79, 88.

U. S. v. *Jones*, 131 U. S. 1.

Craig v. *Leitensdorfer*, 123 U. S. 189, 202.

S. C. & St. P. R. R. Co. v. *U. S.*, 36 Fed. Rep. 610, 612.

Aurora Hill M. Co. v. *85 Min. Co.*, 34 Fed. Rep. 515, 519.

Marquez v. *Frisbie*, 101 U. S. 473, 475.

Forbes v. *Driscoll*, 31 N. W. Rep. 633.

Litchfield v. *Register*, 9 Wall. 575, 578.

Wright v. *Roseberry*, 121 U. S. 488, 508.

Gaines v. *Thompson*, 7 Wall. 347.

The interior department in deciding these questions acts, not in an independent judicial capacity, empowered to decide the questions of fact necessary to determine whether the land was granted or remains the property of the United States, as between contesting litigants, but acts as the agent of the government, authorized by it in the granting act to determine on behalf of the government what lands were of the description granted, and, when satisfied that a specific tract is of such description, to issue a quit-claim deed, called a patent, certifying this fact on behalf of the government, thereby freeing the lands from the government's potential claim thereto; and in the absence of fraud and mistake of law, binding the government, the principal, and its privies, by that decision. And since, under the decisions last cited, the actions of this agent in determining what lands are granted, and issuing its certificate thereof, cannot be compelled or controlled by the courts, there is no forum in which, in the absence of action by the de-

partment, the railroad company can have the question as to what lands were free from claims or rights, finally determined as against the government so as to free said lands from the government's potential interest, and identify them as granted lands.

It is evident, from what has been said, that odd numbered sections within the limits of the grant, which were, at the dates of the grant and of filing the map of definite location in the office of the commissioner of the general land office, lands not reserved, sold, granted, or otherwise appropriated, and for which there were at said dates, no entries or filings, or applications to make entry or filing, of any kind, of record in the United States district land offices for the districts in which such lands were situate, or in the office of the commissioner of the general land office, are not necessarily lands so "free from pre-emption or other claims or rights," as to be a part of the granted lands. And since it is impossible for the railroad company or anyone else to know, or, in advance of action by the department, to conclusively ascertain what specific tracts were free from claims or rights at the dates of the grant and of the definite location of the road, or to ascertain further than as shown by the records of the land office; and as there is no forum whose duty it is, upon the application of the company to determine these questions as between the railroad company and the government, so as to

free the tracts from the government's potential interest, it must be admitted that lands conditioned as those described in the question are not necessarily granted lands, and that it is impossible to finally determine, in advance of patent or certification, what lands are so free from claims or rights as to identify them as a part of the granted lands.

Turning from an analysis of the necessary result of the departmental interpretation of the term "claims or rights," we find that the whole departmental practice in adjusting these land grants and determining whether lands are granted or not, a practice extending over a period of more than thirty years, is based and founded upon the proposition that the lands granted are not defined by survey of the lands and location and construction of the line of the road, but that they remain unsegregated from the public domain until patent or certification; and that the government retains, by reason thereof, an interest in the lands.

We have seen that under a grant like that to the Northern Pacific, the legal title vests in the grantee at the date of the granting act, and attaches to the specific tracts upon their identification as part of the lands granted. After that time the United States possesses no further interest therein. Now, there is no proposition of law better settled than that with the passage of the title and all interest in the land from the government, all jurisdiction of the

interior department over the land and over the title conveyed, ceases. Its functions are confined to the public lands.

Noble v. *Union River Logging Co.*, 147 U. S. 165, 175.

Moore v. *Robbins*, 96 U. S. 530, 533.

U. S. v. *Schurz*, 102 U. S. 378, 402.

Curtner v. *U. S.*, 149 U. S. 662, 675-6.

Tubbs v. *Wilhoit*, 138 U. S. 134, 145-6.

Hardin v. *Jordan*, 140 U. S. 371, 400-1.

And it is immaterial whether the title passes by patent, or legislative grant—if it be of land with defined boundaries or capable of identification—or by the attachment of a previously granted float title to a specific tract by its becoming defined with fixed boundaries, or capable of identification.

Tubbs v. *Wilhoit*, 138 U. S. 134, 145.

Tubbs v. *Wilhoit*, (Cal.) 14 Pac. Rep. 361, 364.

Howell v. *Slauson*, (Cal.) 23 Pac. Rep. 692, 694.

Langdeau v. *Hanes*, 21 Wall. 521, 530.

And if the lands granted are identified by their survey and the fixing of the definite location of the road (which must be the time of identification, if identified prior to patent or certification), so that the title granted attaches to the specific sections, the duties of the interior department with reference thereto, and its jurisdiction thereover for any purpose whatsoever, save the ministerial duty of issuing patents as evidence of the title, necessarily

terminates *eo instanti*. The department, however, asserts that it retains jurisdiction over lands conditioned as those described in the question, until patented or certified. Says Secretary Noble:

> "It is not questioned that the land department has jurisdiction until patent or certification, as the case may be, to the company, to determine whether any of the lands within the lateral limits of the grant had been, at the time the line of the road was definitely fixed, 'sold, reserved or otherwise disposed of' or was subject to a 'pre-emption or homestead claim' and therefore excepted from the grant. That such jurisdiction exists there can be no doubt."
>
> *C. P. R. R. Co. v. Valentine*, 11 L. D. 238, 243.

And it is a matter of common knowledge that the department constantly exercises jurisdiction over the surveyed lands within this grant, and within similar grants, after the maps of definite location are filed and the road completed; and orders hearings and takes testimony for the purpose of ascertaining facts to determine whether the specific tracts are granted. This has been the constant practice since the first railroad grant. It is the logical and necessary result of the departmental construction by which the term "claims or rights" is made to include settlements and acts the only evidence of which must rest in the memory of the actors, or of such witnesses as there might be, acts of which there can be no record evidence. If such facts can be material, it was and

is essential that the evidence thereof should be gathered and weighed by the officials charged with the duty of determining what lands are granted; and, as a necessary consequence of this construction, it becomes necessary for the department to take jurisdiction and order hearings to obtain this essential evidence. If the evidence is material, the jurisdiction to obtain it follows. And the claim and exercise of such jurisdiction is absolutely inconsistent with a theory that the lands are identified before certification or patent.

This court must therefore hold, either that the lands granted are not, as a matter of law, identified by the survey of the lands and the filing of the map of definite location, and concede that lands circumstanced as those described in the question are not fully identified or segregated from the public domain; and that such lands are not defined as a portion of the grant; or must hold that this constant practice of the interior department is pursued without authority of law; and that the hearings and decisions thereon are mere nullities, void and without effect.

2. IS THE ADMITTED CONDITION, THAT THESE LANDS ARE NOT KNOWN TO CONTAIN MINERAL, EQUIVALENT TO THE REQUIRED CONDITION THAT THEY SHOULD NOT BE MINERAL?

The answer to this question must be found in the definition of the term "mineral land."

Three definitions of this term have been given:

First, it has been held by the courts that it means only those lands containing mineral in quantities sufficient to add to their richness and to justify expenditures for its extraction, and known to be so at the date of the grant.

Davis v. *Wiebbold*, 139 U. S. 507, 519.

N. P. R. R. Co. v. *Barden*, 46 Fed. Rep. 592, 594.

Francoeur v. *Newhouse*, 40 Fed. Rep. 618, 620.

Francoeur v. *Newhouse*, 43 Fed. Rep. 236.

Hunt v. *Steese*, (Cal.) 17 Pac. Rep. 920, 922.

N. P. R. R. Co. v. *Wright*, (C. C. A.) 54 Fed. Rep. 67, 69.

Second, that the term includes all lands which in fact contain mines, whether known or unknown; and that by reason of the exclusion of "mineral lands" from a grant like that to the Northern Pacific, the title to no land passed to the grantee under the grant, which, *in fact*, contained mines secreted in its depths at the time the grant attached to the specific lands and became perfect, (or, rather, at the date of definite location; it could never become perfect under this construction,) though the existence of the mineral was then unknown and unsuspected, and there was nothing to indicate that any mine was there.

Speech of Senator Sanders, 21 Cong. Rec. 10964.

Third, That it is the known mineral condition of the land at the date of patent or certifica-

tion that determines whether it is "mineral" or not.

C. P. R. R. Co. v. *Valentine*, 11 L. D. 238, 242.

N. P. R. R. Co. v. *Barden*, 46 Fed. Rep. 592, 609, 623. (Opinion of Knowles, J.)

The date of the grant, under the first definition, is held to mean, in railroad grants, the date of the definite location of the line of the road.

N. P. R. R. Co. v. *Barden*, 46 Fed. Rep. 592, 604.

Francoeur v. *Newhouse*, 43 Fed. Rep. 238.

Francoeur v. *Newhouse*, 40 Fed. Rep. 618, 620.

This definition fixes the time at which these lands must be known to be mineral to be excepted from the grant, at the date of filing the map of definite location, on the theory that by that act the sections granted are identified so as to attach the title granted to the specific tracts. It is the basis of the opinion upon this point of the learned judge of the United States circuit court in deciding this case.

N. P. R. R. Co. v. *Walker*, 47 Fed. Rep. 683.

And it must be conceded that if the exception of "mineral lands" excludes from the grant only those lands known to be mineral at the date of definite location, the admitted condition that the lands were not and are not *known* mineral lands, is equivalent to the prescribed condition that they must be non-mineral, and

all doubts as to identity arising from this cause must vanish. We shall, however, as in the case of the phrase "free from pre-emption or other claims or rights" adopt, for the purposes of this case, that definition of the term "mineral lands" sanctioned by the decisions of the interior department; and for the same reason, viz., that it is the law under which the grant is adjusted, the law by which the company's claim to every tract of land is determined, in the first instance at least. That definition is the third: that those lands only are excluded as "mineral lands" which are known to be mineral at the date of patent or certification.

Says Secretary Noble:

"The exception from the grant is explicit, unequivocal and absolute. It is 'that all mineral lands shall be excepted from the operation of this act.' There can be no reasonable question about the interpretation of this language. It clearly means that no 'mineral lands' were granted or intended to be granted by the act. The discovery of the mineral character of lands within the lateral limits of the grant, after the date when it acquired precision, only proves that such lands were always mineral lands, and serves to bring them clearly within the excepting clause of the grant. They are, and were, no less 'mineral lands' because not *known* to be such, at the date of the grant, or at the date when it acquired precision.

"It is not questioned that the land department has jurisdiction until patent, or certification, as the case may be, to the company, to determine whether any of the lands within the lateral limits of the grant had been, at the time the line of the road was definitely fixed, 'sold, reserved, or otherwise disposed of,' or subject to 'a pre-emption or homestead claim,' and therefore excepted from the grant. That such jurisdiction exists, there there can be no doubt, and I am

unable to perceive upon what principle of logic or process of reasoning it can be claimed that a like jurisdiction does not exist for the purpose of determining whether the lands are mineral, and for that reason, excepted from the grant. Manifestly, the jurisdiction to determine the exception is the same, whether the inquiry is instituted as to the character of the land, or as to its particular status at the date when the rights of the company attached under the grant. If, in the prosecution of this inquiry, the lands are discovered to be mineral, or if, prior to patent, or certification where patent is not required, such discovery is otherwise made, and brought to the attention of the land department, in either event, the discovery proves the land to have been mineral at the date mentioned, and serves to bring it within the excepting clause of the grant. No date is fixed in the grant at which the mineral character of the lands must be known, in order to bring them within the exception. If in fact mineral, they are within the exception, according to the plain terms thereof, whether their mineral character is known at the time of definite location or approval of survey, or not."

C. P. R. R. Co. v. *Valentine*, 11 L. D. 238, 242.

See also:

Annual Report of the Secretary of the Interior for 1891, pp. 21-2.

N. P. R. R. Co., 13 L. D. 699.

N. P. R. R. Co. v. *Champ. Con. Mine*, 14 L. D. 699.

And such doctrine is asserted by Judge Knowles to be the law in his dissenting opinion in *N. P. R. R. Co.* v. *Barden*, 46 Fed. Rep. 609.

It is obvious that if this definition obtain, the admitted condition, that these uncertified and unpatented odd numbered sections were

not, and are not, *known* to be mineral, is not equivalent to the required condition that the lands shall be non-mineral; and it is equally obvious that if it is the known mineral condition of land at the date of patent that is to determine whether they are granted, it is impossible to determine that question prior to that time. The *known* mineral condition of lands must be constantly subject to change as exploration or chance develops the existence of deposits theretofore unknown.

"There are vast tracts of country in the mining states which contain precious metals in small quantities, but not in sufficient extent to justify the expense of their exploitation. It is not to such lands that the term 'mineral' in the sense of this statute is applicable."

Davis v. *Wiebbold*, 139 U. S. 507, 519.

Deffeback v. *Hawk*, 115 U. S. 392, 404.

Ah Yew v. *Choate*, 24 Cal. 562, 567.

Merrill v. *Dixon*, 15 Nev. 401, 407.

Alford v. *Barnum*, 45 Cal. 482, 484.

U. S. v. *Reed*, 28 Fed. Rep. 482, 486.

Hunt v. *Steese*, (Cal.) 17 Pac. Rep. 920, 922.

Dughi v. *Harkins*, 2 L. D. 721.

Cutting v. *Reininghaus et al.*, 7 L. D. 265, 267.

Peirano et al v. *Pendola*, 10 L. D. 536.

Winters et al v. *Bliss*, 14 L. D. 59.

Berry v. *C. P. R. R. Co.*, 15 L. D. 463.

These authorities fully establish that land to be mineral must be more valuable for mining than for agriculture. The character of land as mineral changes, therefore, not only by

reason of additional discoveries, but also may change by reason of new improvements whereby lands which under former known methods of mining would not justify the expense of their exploitation, are now, or may, in the future, be profitably mined. The character may further change by alterations in the surrounding agricultural conditions whereby the value for agricultural purposes is changed. Every acre of land conditioned as that described in the question may become mineral before it is patented, and, if so, it is not granted; and as it is impossible to say now that this change will not occur to any or every portion thereof, it cannot now be said that any portion of such land is granted. The difficulties in the way of identifying the lands arising from this cause are even greater than those arising from the doubt whether they were free from claims or rights at the dates of the grant and definite location. There the facts determining whether the lands were so free or not, actually exist; here, since the known mineral condition is subject to change, and the time when that known condition must determine if the land be granted, is indefinitely in the future, the facts upon which to base the determination do not exist even. It is impossible, therefore, to identify lands prior to patent as mineral or non-mineral within the terms of the grant, and, consequently, impossible to identify the granted lands prior to that date. And lands within the conditions stated in the

question are by no means identified as granted lands, although, it is evident no stronger statement of the facts showing them to be granted could honestly be made prior to certification or patent.

3. LANDS IN THE CONDITION OF THOSE DESCRIBED IN THE QUESTION BEING UNIDENTIFIED AS GRANTED LANDS AND UNSEGREGATED FROM THE LANDS OF THE UNITED STATES, ARE NOT TAXABLE.

(*a*) The United States retains, in all of the lands, until their final segregation, an interest sufficient to enable it to perform that duty. And lands in which the United States has such an interest are not taxable. A sale of the lands for taxes would, if valid, destroy such interest and prevent the performance of such duty.

"No sale of lands for taxes, no taxes can be assessed on any property, but by virtue of the sovereign authority in whose jurisdiction it is done. If not assessed by the direct act of the legislature itself, it must, to be valid, be done under authority of a law enacted by such legislature. A valid sale, therefore, for taxes, being the highest exercise of sovereign power of the state, must carry the title to the property sold, and if it does not do this, it is because the assessment is void. It follows that if the assessment of these taxes is valid and the proceedings well conducted, the sale confers a title paramount to all others."

N. P. R. R. Co. v. *Traill Co.*, 115 U. S. 600, 610.

Railway Co. v. *McShane*, 22 Wall. 444, 462.

It necessarily, therefore, extinguishes this interest of the United States, and destroys the jurisdiction of the interior department over these lands for all purposes, whether to determine if they are mineral, or were subject to claims or rights or otherwise. If the sale would not confer such a title it is because there exists no authority to make it. The authority or lack of authority to make the sale must be determined from the facts as known at the time of the sale, not from subsequent events. Should the court hold these lands taxable under the conditions set forth and they be sold and a tax deed issued, the tax title holder would have a perfect title. Should anyone thereafter seek to mine on the land such tax title holder could eject him. If a mine were discovered thereon, it would be his property. Should the United States seek to give a patent to another on the theory that the land was, at the date of such patent, known to be mineral, or had been ascertained to have been occupied by a qualified settler at the date of definite location or grant, and so excepted from the grant, the holder of the tax title, as the holder of the legal and paramount title, could enjoin such action.

Noble v. *Union River Logging Co.* 147 U. S. 165.

It would be no answer to his claims to say the lands were excepted from the grant and not taxable. His incontrovertible reply would be: At the date of the definite location there were

no filings or entries of record for this land; it was not known then, nor at the date of the tax levy or sale, to be mineral land, and the court holds the law to be that lands of which such facts can be predicated, are taxable. Of what avail is it to show a subsequent discovery of mineral? Being taxable when the taxes were levied, the sale was valid, and the tax title is paramount.

The tax sale would, therefore, have prevented the government from determining what lands had been granted. It would have interfered with the reserved right of the government to exercise jurisdiction over the unpatented lands, thus defeating the intention of congress and interfering with the primary disposal of the public domain.

The value of this potential interest of the government in these lands may be best determined by the control it enables the government to exercise thereover. It not only enables the government to exercise jurisdiction thereover, through the interior department, as heretofore stated, but also enables the United States to subject *all* these lands to exploration for minerals by itself or to authorize others to so explore them.

This is necessarily so. If these odd numbered sections are subject to location and purchase as mineral lands upon the discovery of mineral therein at any time prior to patent, they are all subject to exploration for minerals

until that time. If congress intended to exclude from the grant all lands found to be mineral prior to patent, it must have intended that they should remain, until that patent, subject to the right of search. It would be absurd to say that if a person found a mine in these lands by accident, he could locate and purchase it, but that if he found it while searching for it, he could not take advantage of the discovery because search is forbidden. Says this court:

"If their title would not protect them against a discovery of mines in them, neither would it protect them against an invasion of their property for the purpose of exploring for mines."

Davis v. *Wiebbold*, 139 U. S. 525.

N. P. R. R. Co. v. *Barden*, 46 Fed. Rep. 598.

Id. Opinion of Judge Knowles, 623.

And the interior department has constantly held that lands circumstanced as those described in the question are such "lands belonging to the United States" as to subject them to exploration under the mining laws.

The mining law, R. S. 2319, provides, in terms, for the exploration and purchase of valuable mineral deposits in "lands belonging to the United States." Indeed, it is public lands only that congress has authority to grant a license to go upon. After lands have become the property of a private individual and the government has ceased to have any interest therein, it cannot authorize an entry thereof without the consent of the owner, for the purpose of

exploring for mineral, or for any other purpose.

Francoeur v. *Newhouse*, 40 Fed. Rep. 618, 624, (opinion of Judge Sabin.)

Davis v. *Wiebbold*, 139 U. S. 507, 528.

Golden Terra M. Co. v. *Mahler*, 4 Morrison's Min. Rep. 390, 398.

Kendall v. *San Juan M. Co.*, 12 Pac. Rep. 198, 201.

Amador Medean G. M. Co. v. *S. S. H. M. Co.*, 36 Fed. Rep. 668.

Iron Silver M. Co. v. *Campbell*, 135 U. S. 286.

Noyes v. *Mantle*, 127 U. S. 348.

Belk v. *Meagher*, 104 U. S. 279, 283.

Abraham L. Miner, 9 L. D. 408.

North Noonday M. Co. v. *Orient Co.*, 11 Fed. Rep. 125.

That lands in which the United States has such an interest as this are not taxable, is elementary.

Sec. 44 of Enabling Act of North Dakota, approved Feb. 22, 1889.

Sec. 176, Art. XI, Constitution of North Dakota.

Sec. 203, Art. XVI, Constitution of North Dakota.

Revised Statutes, sec. 1851.

Wis. Cen. R. R. Co. v. *Price Co.*, 133 U. S. 496, 505.

N. P. R. R. Co. v. *Traill Co.*, 115 U. S. 600, 610.

Colorado Co. v. *Commissioners*, 95 U. S. 259, 265.

Railway Co. v. *McShane*, 22 Wall. 462.

Railway Co. v. *Prescott*, 16 Wall. 603, 608.

And in *Germania Iron Co.* v. *U. S.*, 58 Fed. Rep. 334, the court of appeals held that the right of the secretary to exercise jurisdiction over public lands, was a right of such value as to authorize a suit by the United States to cancel a patent.

(*b*) Where the lands of the government and of its grantee are unsegregated and indistinguishable, the government and grantee become tenants in common of the entire tract.

Frasher v. *O'Connor*, 115 U. S. 102, 107.

Freeman on Cotenancy and Partition, §96 (2nd ed.)

Dubuque etc. R. R. Co. v. *Litchfield*, 23 How. 66, 89.

Veeder v. *Guppy*, 3 Wis. 502, 520, *et seq.*

Portage City Case, 8 Op. Atty. Gen., 255, 258.

Griswold v. *Johnson*, 5 Conn. 363, 365.

Such is the relation here. Each party necessarily possesses, until the segregation, a potential interest in the entire mass, in every stick, twig and stone thereon. The fact that the government can, through its agent, the secretary of the interior, determine for itself which lands it has granted, and, by patenting or certifying the same to the railroad company, partition the lands and identify the property of each, is immaterial; until it does so the tenancy in common remains; the interest of the government in all the lands continues to exist.

Mahoney v. *Van Winkle*, 21 Cal. 553, 577.
Van Reynegan v. *Bolton*, 95 U. S. 33, 36.
Frasher v. *O'Connor*, 115 U. S. 102, 107.

Without discussing whether the interest of the private individual in the property so held is subject to taxation, it is certain the entire tract cannot be assessed and sold for taxes, as the bill shows is attempted to be done here. And where the land as an entirety is assessed to one having but an unsegregated or equitable interest therein, the sale of the land for such taxes will be enjoined at his instance.

Colorado Co. v. *Commissioners*, 95 U. S. 259, 265.

Further, until the exact amount of land belonging to each party is known, an impossibility here, the extent of the interest to be assessed to either party cannot be known.

(*c*) Certainty in the object taxed is essential to the legality of every tax. Notice of the action of the taxing officers is a condition precedent to the constitutionality of the tax law and the validity of the tax. The collection of a tax without such notice is taking property without due process of law, and is forbidden.

The Railroad Tax Cases, 13 Fed. Rep. 722, 750.
Burns v. *Multnomah R. R. Co.*, 15 Fed. Rep. 177, 183.
Cooley on Taxation, 363 *et seq.* (2nd ed.)

Such notice to be sufficient must describe the property so that it can be recognized. The purposes of the description are, *first*, that the owner may have information of the claim made upon him or his property; *second*, that the public, in case the tax is not paid, may be notified what land is offered for sale for the non-payment; *third*, that the purchaser may be enabled to obtain a sufficient conveyance. And if the description does not attain these objects, it is insufficient; and the attempted notice will not amount to a notice in law. It is obvious that notice such as must be given of lands conditioned as those described in the question must be insufficient. A description of the lands by metes and bounds is of no avail, for each party has a potential interest in each and every part thereof. Nor is it possible to segregate, for the purposes of taxation, the interest of the railroad company and tax that only. The quantity of the interest of each party is wholly unknown and unknowable. The railroad company may own ninety-nine per cent. of the lands, but on the other hand, the United States may own ninety-nine per cent. The interest of the railroad company cannot, therefore, be assessed or taxed. And in this case the counties have not attempted to tax the interest of the company in the lands, but the lands themselves.

Again, it should be remembered that while the company and the government occupy a relationship analogous to a tenancy in common

with respect to lands circumstanced as those described in the question by virtue of their common potential interest, and the necessity of such a relation to enable either party to protect the land from third parties, yet the grant is not of an undivided interest, but of specific lands; and the partition must be, not by setting apart a certain proportion of the lands to each party, but each takes the specific lands as they respectively fall within or without the terms of description in the granting act. Every description, therefore, if it include more than the smallest government subdivision, may include a tract of government land and a tract of railroad land; if it be of the smallest government subdivision, it may be determined finally to be all railroad or all government land. The interest of the company in these lands cannot be segregated, therefore, for the purpose of taxation. No notice of the tax proceedings can be given which will advise the owner as to what claim is made upon him or his property; or that will advise the public of what lands are to be sold; or the purchaser of what land is bought.

The lands described in the question occupy, for the purposes of taxation, precisely the same position as unsurveyed lands coterminous with a completed section of the road; and any reasoning that sustains the taxability of these lands, must also sustain the taxability of such unsurveyed lands. The survey is but one

step in the identification of the lands. By it the lands included within the even sections are eliminated from the problem. The probabilities of any particular tract in the remaining lands falling within the description in the granting act, are greatly increased; but if that survey does not completely identify the lands, and we have seen that it does not, it cannot alter the *nature* of the relation borne by the government and the company to each specific tract of land remaining unidentified, nor of their relation to each other with respect thereto. That such unsurveyed lands are not taxable has never been doubted. And the same rule must be applied to these lands, and for the same reasons.

(d) It has been urged in this case before, by appellees, and we presume it will be here, that, as to every parcel of land within the limits of the grant, the appellant has had, ever since the definite location of the road, an absolute title to that parcel, or it has not had and can never have, under the grant, any title thereto whatsoever; that appellant is supposed to know what it owns; and that it should pay taxes on what it knows it owns; that the lands described in the bill are entirely free from all claims by the United States, or they are not owned by appellant; if the former, then it should pay the taxes; if the latter, that it has no interest in the matter and no standing in court.

This argument is based upon the proposition that the company is supposed to know what, we have shown, is impossible to be known, either by the company or anyone else. There is no such presumption as that stated by appellee, either in law or in fact. The law is a reasonable science. It is made by reasonable men for reasonable men; and it does not require or presume impossibilities. Lands in which a party has, in common with the United States, a potential interest only, although a potential legal interest, are not taxable.

The supreme court of Iowa, laying down the true rule in such case, says:

"No rules of law or equity would require defendants to pay taxes upon lands which they had no assurance would ever become their property."

Grant v. *I. R. R. L. Co.*, (Ia.) 7 N. W. Rep. 113.

The argument also overlooks the fact heretofore pointed out, that by reason of the lack of identification each party has a potential interest in every tract. The title granted does not attach to the specific tracts until they are so identified as to authorize the grantee to maintain the possession thereof against the world.

Curtner v. *U. S.*, 147 U. S. 662, 675.

And until it does so attach, the inchoate potential interest of the grantee subsists side by side with the similar interest of the grantor.

(e) The conclusion reached, that lands not fully segregated from the public domain, and unidentified, are not taxable, is fully sustained by authorities.

The court in *Wisconsin Cent. R. R. Co.* v. *Price County*, 133 U. S. 490, 505, in enumerating the conditions which must exist to render lands in the condition of those described in the bill, taxable, expressly says: they must be "distinctly defined."

And see also:

Whitney v. *Gunderson*, 31 Wis. 359, 381.

Cedar Rapids & M. Co. v. *Woodberry Co.*, 29 Iowa 248.

I. R. R. L. Co. v. *Story County*, 36 Iowa, 48, 51.

Cedar Rapids & M. Co. v. *Carroll Co.*, 41 Iowa 153, 161.

Grant v. *I. R. R. L. Co.*, (Ia.) 7 N. W. Rep. 113.

C. P. R. R. Co. v. *Howard*, 52 Cal. 227, 230-1.

Litchfield v. *Webster Co.*, 101 U. S. 772, 775.

"Lands held by a railroad company under land grant acts of congress, which have never been certified or set apart, and which are incapable of identification, are not taxable. Taxation denotes and implies identification of the thing taxed."

Blackwell on Tax Titles, § 817 (5th ed.)

We submit that upon this ground these lands must be held non-taxable.

QUESTION II.

17 ARE THE ODD NUMBERED SECTIONS OF LAND WITHIN THE PLACE LIMITS OF THE GRANT TO THE NORTHERN PACIFIC RAILROAD COMPANY MADE BY THE ACT OF CONGRESS APPROVED JULY 2, 1864, WHICH HAVE NOT BEEN, AND ARE NOT, KNOWN TO BE MINERAL, AND WHICH WERE, AT THE DATE OF THE GRANT AND AT THE DATE OF THE FILING THE MAP OF DEFINITE LOCATION IN THE OFFICE OF THE COMMISSIONER OF THE GENERAL LAND OFFICE, NOT RESERVED, SOLD, GRANTED, OR OTHERWISE APPROPRIATED, AND FOR WHICH THERE WERE AT SAID DATES NO ENTRIES OR FILINGS OR APPLICATIONS TO MAKE ENTRY OR FILING OF ANY KIND, OF RECORD IN THE UNITED STATES DISTRICT LAND OFFICES FOR THE DISTRICTS IN WHICH SUCH LANDS WERE SITUATE, OR IN THE OFFICE OF THE COMMISSIONER OF THE GENERAL LAND OFFICE, TAXABLE BY THE STATES AND TERRITORIES AFTER THE FILING OF THE MAP OF DEFINITE LOCATION OF SAID RAILROAD, AND A FULL COMPLIANCE BY SAID RAILROAD COMPANY WITH THE TERMS AND CONDITIONS OF THE GRANTING ACT, SO LONG AS THE UNITED STATES REFUSES TO PATENT OR CERTIFY SUCH LANDS TO THE RAILROAD COMPANY, FOR THE REASON THAT NEITHER THE UNITED STATES NOR ITS OFFICERS HAVE ASCERTAINED OR DETERMINED WHETHER SAID LANDS ARE MINERAL OR NOT, AND WHETHER SAID LANDS WERE FREE FROM CLAIMS OR RIGHTS AT THE DATE OF SAID GRANT AND OF FIXING THE LINE OF DEFINITE LOCATION OPPOSITE SAID LANDS; AND WHILE THE QUESTION WHETHER THE TITLE TO SAID LANDS PASSED BY VIRTUE OF SAID GRANT TO SAID GRANTEE, IS IN CONTROVERSY AND PENDING BEFORE THE INTERIOR DEPARTMENT UPON UNDETERMINED QUESTIONS OF FACT?

(*a*) The question concedes that the title to these lands is the subject of controversy, and pending before the department upon undeter-

mined questions of fact. In every case where this question has arisen, it has been held that such lands are not taxable.

C. P. R. R. Co. v. *Howard*, 52 Cal. 227, 231.
Grant v. *I. R. R. L. Co.*, (Ia.) 7 N. W. Rep. 113.
Doe v. *I. R. R. L. Co.*, (Ia.) 7 N. W. Rep. 118.
Dickerson v. *Yetzer*, (Ia.) 6 N. W. Rep. 41.

And unless the court is of opinion that under the law there can be no such contest, we submit that it should hold these lands nontaxable.

(*b*) We have seen that until the lands granted by the act of July 2, 1864, to aid in the construction of the Northern Pacific Railroad are fully defined and identified, the title granted does not attach to the specific tracts; and the United States retains a potential interest therein. We have also seen that this potential interest can only be cut off by the action of the interior department, that no other tribunal is authorized by law either to determine as between the government and the company whether lands are mineral, or in any other manner to control in advance, the determination of that tribunal. Until this question is determined by the department and the potential interest of the United States thereby extinguished, the railroad company is not entitled to a patent for the lands. There is something remaining to be done, some act to be performed, before its right

to the patents is complete. And it is settled that, under these conditions, unpatented lands are not taxable. It is only "when the government has ceased to hold any such right in the property as to justify it in withholding a patent from the donee or purchaser," that the same will be held subject to taxation as his property.

Wis. Cen. R. R. Co. v. *Price Co.*, 133 U. S. 496, 505.

Railroad Co. v. *Prescott*, 16 Wall. 603, 608.

It will not do to say that the determination of this question is a mere ministerial duty. Were it ministerial only, its performance could be compelled by mandamus and would be subject to the control of the courts. It requires for its performance the collection, examination and weighing of evidence. Judgment, discretion, knowledge of the law and balancing of testimony are essential. Such a determination is a judicial action.

Iron-Silver M. Co. v. *Campbell*, 135 U. S. 286.

And this action, since it is essential to the extinguishment of the potential interest of the government and to the attachment of the title granted to the specific land, goes to the very foundation of the company's right. Until such action is taken, and the government has, through its agent, recognized the grantee's claim, it must stand in the attitude of contesting that grantee's title, passively, it may be, but still contesting it, questioning it and

doubting it, standing ready to make the passive contest an active one upon the slightest intimation that the facts are not precisely as claimed by the railroad company. While this silent denial and question of these facts claimed by the company continues, the lands are not taxable. While there exists a contest before the interior department as to whether these lands fall within the description of granted lands, the issue of such contest depending upon disputed questions of fact, the department is not merely justified in withholding patents from the claimant, but it is its duty to do so. The right of the grantee to the patents is not perfect and complete. Until such contest has been determined there cannot be a taxable interest in the lands. And no distinction can be taken between lands concerning the title to which there is an active contest, and lands the title to which is passively disputed, but held subject to the possibility of such active contest being initiated. If land would not be subject to taxation if a miner should claim it to be mineral and initiate a contest before the land officers, it is not taxable while held subject to the possibility of the initiation of such claim. The initiation of the contest does not change in the slightest the nature or quantity of the government's interest in the land; nor does it alter the company's interest in the land; and if that interest was a taxable one before, it must so continue, not-

withstanding the contest. The contest has merely accentuated a doubt, a question, that was before quiescent and unnoticed.

It is no objection that this act remaining to be done is one to be performed by the government and not by the company. The act is but one step in the identification of the lands by the government as preliminary to the issuance of patents; and since it is as essential that lands be non-mineral to be within the grant, as it is that they be in odd numbered sections, it is just as essential to the identification precedent to such patenting that they be determined to be non-mineral, as that they be determined to be within odd sections. In each case the necessary determination can be made by the government alone. The company can do nothing. And the action of the government in surveying the lands in not more essential to the foundation of the company's claim to the specific tracts, than is the determination whether they are mineral or not.

We think the second question certified must be answered in the negative.

QUESTION III.

ARE THE SAID LANDS TAXABLE PRIOR TO THE FURNISHING BY THE GRANTEE OF AFFIDAVITS OF THEIR NON-MINERAL CHARACTER, SUCH NON-MINERAL AFFIDAVITS HAVING BEEN REQUIRED BY THE INTERIOR DEPARTMENT AS A CONDITION PRECEDENT TO THE ISSUANCE OF PATENTS FOR, OR CERTIFICATION OF, SAID LANDS TO SAID RAILROAD COMPANY?

Unpatented and uncertified lands are taxable only when the right to the patent is perfect and complete, no further act going to the foundation of that right remaining to be done—only when the United States has ceased to hold any such right or interest as would justify it in withholding the patent.

Wis. Cent. R. R. Co. v. *Price County*, 133 U. S. 496, 505.

N. P. R. R. Co. v. *Traill County*, 115 U. S. 600, 606.

Colorado Imp. Co. v. *Commissioners*, 95 U. S. 259.

Railway Company v. *Prescott*, 16 Wall. 603, 608.

Railway Co. v. *McShane*, 22 Wall. 444, 462.

And if the department is authorized to require the non-mineral affidavits as a condition precedent to the issuance of the patents, the right to the patents is not complete until the affidavit is furnished; an act going to the very foundation of that right remains to be done.

And as a sale of the lands for taxes, if valid, confers a paramount title, it follows that if

the lands be taxable and the tax proceedings well conducted, the sale necessarily destroys the right of the government to demand such affidavits. Such tax proceedings and sale, therefore, would conflict with the requirement that the territory should not levy taxes on the property of the United States, or pass any law interfering with the primary disposal of the soil (12 Stat. 241); and also the stipulation to the same effect entered into by the state upon its admission into the Union (see constitution of North Dakota, Article XI and XVI; also act of congress, approved February 22, 1889, sec. 4, 25 Stat. 676); and hence would be void.

QUESTION IV.

IS CHAPTER 107 OF THE LAWS OF DAKOTA, FOR 1889, BEING AN ACT ENTITLED "AN ACT PROVIDING FOR THE LEVY AND COLLECTION OF TAXES UPON THE PROPERTY OF RAILROAD COMPANIES IN THIS TERRITORY," APPROVED MARCH 7, 1889, IN CONFLICT WITH SECTION 8 OF ARTICLE I OF THE CONSTITUTION OF THE UNITED STATES, AND VOID AS A REGULATION OF INTERSTATE COMMERCE?

By the sixth section of the act of congress approved March 2, 1861, it was provided that the legislative power of the territory should extend to all rightful subjects of legislation consistent with the constitution of the United States and the provisions of the act itself. 12 Stat. 241, R. S. 1851, 1925. And since the pow-

er to tax is a legislative power, (Cooley on Taxation, chap. 2 (2nd ed.), this grant of legislative power carried with it full authority to levy taxes, subject only to such limitations as were contained in the Federal constitution, or in the organic act. Pursuant to the authority thus conferred, the legislature of Dakota passed an act, approved March 7, 1889, providing as follows:

"An Act providing for the levy and collection of taxes upon property of railroad companies in this Territory.

"*Be it enacted by the Legislative Assembly of the Territory of Dakota*:

"1. Percentage of Gross Earnings to be paid in lieu of other taxes.—In lieu of any and all other taxes upon any railroads, except railroads operated by horse power, within this territory, or upon the equipment, appurtenances or appendages thereof, or upon any other property situated in this territory belonging to the corporation owning or operating such railroads, upon the capital stock or business transactions of said railroad company, there shall hereafter be paid into the treasury of this territory an amount equal to a percentage of all the gross earnings of the corporation owning or operating such railroad, arising from the operating of such railroad, as shall be situated within this territory, both upon territorial and interstate traffic, in case the railroad company owning or operating such line shall accept and become subject to this act as hereinafter provided.

"Every such railroad corporation or person owning or operating or that may hereafter own or operate any line of railroad in this territory which shall have accepted this act shall pay to said treasurer each year 'for the first five years' after the approval of this act an amount equal to three percentum of such gross earnings 'and for and in each and every year after the

expiration of such five years an amount equal to two per cent of said gross earnings,' and the payment of such amount annually as aforesaid shall be and is in full of any and all other taxation and assessment whatever upon the property aforesaid.

"Said payments shall be made, except as hereinafter provided, one-half on or before the 15th day of February, and one-half on or before the first day of August in each year. And for the purpose of ascertaining the gross earnings aforesaid, an accurate account of such earnings shall be kept by said company. An abstract shall be furnished by said company to the treasurer of this territory on or before the first day of February in each year, the truth of which abstract shall be verified by the affidavits of the treasurer and secretary of such company, and for the purpose of ascertaining the truth of such affidavits and the correctness of such abstracts, full power is hereby vested in the governor of this territory, or any other person appointed by law, to examine under oath the officers, employes of said company or other persons, and if any person so examined by the governor or other authorized person shall knowingly or wilfully swear falsely, concerning the matter aforesaid, every such person is declared to have committed perjury, and for the purpose of securing to the territory the payment of the aforesaid per centum, it is hereby declared that the territory shall have a lien upon the railroad of said company, and upon all property, estate or effects of said company whatsoever, personal, real or mixed, and the lien hereby secured to the territory shall have and take precedence of all demands, decrees and judgments against said company.

"2. When Company Shall Fail to Make Return.—If any such railroad company having accepted this act shall fail to make return of its gross earnings as aforesaid, or of any part thereof, at the time and in the manner provided by law, and such default shall continue during the period of thirty days, such company shall be subject to a penalty of an amount equal to ten per cent of the tax imposed upon such company by this act, and the treasurer of the territory shall

forthwith ascertain the amount of such percentage justly due from such company, as near as may be, from such evidence as may be available, and shall thereupon collect such amount so ascertained, together with the said penalty thereon.

"The amount so ascertained by the territorial treasurer as in this section provided, shall, together with the said penalty thereon, be by him entered in the books of his office and such entry when so made shall stand in the place of the report required by law to be made by such company and shall in all courts within this territory be evidence of the amount of such tax and penalty and of the other facts stated therein in pursuance of this act.

"3. Neglect to Pay Taxes.—In case any railroad company which shall have accepted the provisions of this act shall fail or neglect to pay the amount reported at the time and in the manner hereinafter provided, for a period of thirty days after the same shall have become due by the terms thereof, in such case there shall be added to the amount of such tax ten per centum thereof as a penalty for such failure or neglect to pay.

"4. Territorial Treasurer to Distrain.—At any time after the expiration of the period of thirty days after the amount as above provided has become due and payable under the provisions of this act, the territorial treasurer or his deputy shall distrain sufficient goods, chattels or other movable property if found within this territory to pay the said amount due from such corporation, together with the penalty thereon as hereinafter provided and shall immediately advertise the sale of the same in at least three newspapers published within this territory, stating the time when, and the place where such property shall be sold; such sale shall take place at some point on the railroad of such delinquent company and at least four weeks' notice of the time and place of such sale shall be given; such delinquent company, its successors or assigns may pay in such amount and penalty at any time before the sale of the property distrained as

herein provided, and thereupon further proceedings in connection with such distress shall cease and the property distrained shall be delivered to the owner thereof.

"5. Land Subject to Taxation.—The lands of any railroad company shall become subject to taxation in the same manner as other similar property as soon as the same are sold, leased, contracted to be sold or leased, and on or before the first day of April of each year each railroad company having lands within this territory shall return to the county clerk of each county within this territory full and complete lists, verified by the affidavit of such officers of the company having knowledge of the facts, of all lands of such company situated within such county sold or contracted to be sold or leased during the year ending the last day of December preceding, and the list furnished on or before the first day of April, A. D. 1889, in compliance with the terms of this section, shall include a complete list of all lands sold or leased, prior to the last day of December, 1888.

"6. How Taxes Apportioned.—The monies received and collected by the territorial treasurer in pursuance to this act shall be disposed of by him as follows: In case the railroad company paying such tax owns no land granted in aid of the construction of its railroad, one-third of the same shall be retained in the territorial treasury for the use of the territory, and the remainder shall be apportioned among the several counties into or through which the railroad or railroads of such companies run, in proportion to the number of miles of main track situated in such counties respectively. In case the railroad company paying such tax owns land granted in aid of the construction of its railroad, then thirty per cent of the tax paid by such company shall be retained in the territorial treasury for the use of the territory and forty per cent shall be apportioned among the several counties into or through which the railroad or railroads of such company run, in proportion to the number of miles of main track situated in such counties respectively, and thirty

per cent shall be apportioned among the several counties in which lands forming a part of its land grant are situated, in proportion to the number of acres of surveyed and unsold lands in said counties.

"7. Any Railroad Company—Which at the date of the passage of this act owns or is engaged in operating any line or lines of railroad in this territory, may at any time within thirty days after the passage of this act, by resolution of its board of directors, attested by its secretary, and filed with the secretary of the territory, accept and become subject to the provisions of this act, and provided that any railroad company which is now in arrears in the payment of taxes assessed under chapter 99, of the laws of 883, shall, within thirty days after the passage of this act, pay into the territorial treasury the full amount of the taxes and interest due under the assessments under said laws of 1883 before they can avail themselves of the provisions of this act, by accepting its terms, including taxes on both territorial and interstate earnings. It is further expressly provided that any company failing to strictly comply with the provisions of this act within the term herein provided shall be immediately subject to assessment and taxation in the manner provided for the assessment and taxation of the property of individuals of this territory and said taxes shall be collected in the same manner as is now provided in cases of the property of individuals. Any company which has not complied with the provisions of chapter 99 of the session laws of 1883 by paying all taxes claimed on gross earnings both territorial and interstate, or by filing an account of gross earnings both territorial and interstate shall prepare and file such account in the manner therein provided within thirty days from the passage hereof, and pay one-half of the entire amount due under the agreement and acceptance herein referred to, for the current year, and also the entire amount of taxes heretofore claimed by the territory on local and interstate earnings of such companies but remaining unpaid at the time of filing said account and within thirty days after the passage of this act, or the same shall not apply to

such company or companies. The balance of said taxes due for the current year shall be paid to the territorial treasurer on or before the 15th day of August, 1889. Any railroad company that may be hereafter organized in this territory, or that shall hereafter become the owner of or engaged in operating any lines of railroad in this territory may accept and become subject to the provisions of this act by filing a resolution of its board of directors in the manner as hereinbefore provided.

In case any such railroad company shall accept and become subject to the provisions of this act, it shall at the time of filing such acceptance render an account of gross earnings both territorial and interstate, in the manner as hereinbefore provided, and shall pay at the time of rendering such account, all amounts claimed by the territorial auditor as tax due on the local and interstate earnings of such company for the current or any preceding year, and shall thereafter pay an amount equal to 3 per centum of such account as follows: If such acceptance is filed on or before the fifteenth day of February in any year, such company shall pay one-half of said amount on said fifteenth day of February, and the balance on the fifteenth day of August following. Should such acceptance be filed before the fifteenth day of August and after the fifteenth day of February in any year, then an amount equal to 3 per centum of such account shall be paid in full on or before the fifteenth day of August in each year. Thereafter accounts shall be rendered and payment made in the manner provided in this act; PROVIDED, that any company failing to promptly and strictly comply with the provisions herein set forth and to pay all sums herein provided to be paid shall be subject to assessment and taxation in the same manner as individuals.

"8. In Case of Non-Acceptance.—The railroads and property of all railroad companies owning or operating lines of railway in this territory, which companies shall not accept and become subject to the provisions of this act shall not be entitled to the exemption in this act contained, but shall be subject to taxation in such manner as shall be provided by law.

"9. Repeal or Amendment.—This act shall be subject to repeal or amendment by any future legislature, and nothing herein contained shall be construed as a repeal of any revenue law now in existence, as applicable to any railroad company which shall not accept the provisions of this act as herein provided.

"10. Effect When.—This act shall take effect and be in force from and after its passage.

"Approved March, 7, 1889."

We think it too clear for argument that the purpose of this law is to commute the taxes which the territory was authorized to levy upon the taxable property of the corporations; and the right of the state or territory to thus commute the customary taxes is, in the absence of constitutional inhibition, unquestionable.

Cooley on Taxation, 69 (2d ed.) and cases cited.

State Bank v. *People*, 5 Ill. 303-4.

Hunsaker v. *Wright*, 30 Ill. 146, 148.

Louisiana State Lottery Co. v. *New Orleans*, 24 La. Ann. 86, 88.

Daughdrill v. *Alabama Life Ins. & Trust Co.*, 31 Ala. 31, 39.

As the discussion here is confined to the question whether the commutation provided for in the Dakota act is in conflict with section 8 of article I of the Constitution of the United States, we may assume, for the purposes of such discussion that such provision is not in conflict with any other provision, either of the constitution of the United States or of the organic act of the territory.

The right of a state or territory to commute a tax rests in its power to contract. Every commuted tax involves an agreement on the part of the state to accept something else in lieu of the tax which it is authorized to collect. This something is, in consideration of the legislature, the fair equivalent for the taxes relinquished. It is, on the part of the party whose taxes are commuted, a bonus paid or agreed to be paid, for the franchise of exemption from ordinary taxes. Although paid in lieu of a tax, it is in no sense a tax itself, but is the purchase price which the state demands in consideration of a franchise which it may grant or withhold.

Mayor v. *B. & O. R. R. Co.*, 6 Gill. 288, 291.

And the amount or nature of that purchase price, or the method by which it is to be computed, cannot be restricted by the commerce clause of the constitution. They are questions solely between the tax payers and the state. That this consideration is a portion of the earnings derived from interstate traffic is of no consequence. The earnings of a transportation company, whether arising from interstate or intrastate commerce, are the property of the corporation, to be disposed of as it may see fit; and a contract by which it agrees to pay part of such earnings to the state in lieu of taxes upon its taxable property, is no more a regulation of, or interference with, commerce than is the payment of the taxes themselves with

money so earned. Had the commutation in this case been for a fixed sum, no one would assert that because the corporation operating the railroad acquired the means to pay such sum from its interstate business, therefore the payment was a tax upon interstate commerce; and graduating the amount to be paid by the earnings of the carrier, does not make the percentage paid a tax upon such earnings or upon the commerce. The nature of the transaction is not affected by the standard used to determine the amount to be paid. To insist that, because the amount paid by a carrier in lieu of its taxes is computed upon a percentage of its earnings, therefore it is a tax upon those earnings, is no more reasonable than to hold that, if the amount so paid were an amount equal to a percentage of the salaries of the members of this court, it would therefore be a tax upon such salaries.

The question here certified is not new. It has been answered several times by this court. See:

Railroad Company v. *Maryland*, 21 Wall. 456, 457.

Maine v. *Grand Trunk Ry. Co.*, 142 U. S. 217, 227.

Delaware Railroad Tax Case, 18 Wall. 206, 231-2.

Appellees will rely upon the decisions of this court in *Fargo* v. *Michigan*, 121 U. S. 230, 237; *Philadelphia S. S. Co.* v. *Pennsylvania*, 122 U.

S. 326, and *Ratterdam* v. *Western Union Telegraph Co.*, 127 U. S. 411. An examination of these cases, however, shows that they are distinguished by their facts from the case at bar, and are decided upon principles which have no application here. Their sole resemblance to this case is that the amount paid to the state was a percentage, or, what is the same thing, an amount equal to a percentage, of the gross earnings of the carrier; but while in the cases last referred to the percentage levied was a tax imposed upon the business of the carrier, the Dakota law, as already shown, does not impose a tax at all, but resorts to the gross earnings merely as the standard by which to fix the amount which the carrier agrees to pay for the exemption from all taxation. The distinction between a case like the one at a bar and those relied upon by appellee is pointed out and made the foundation of the decision of this court in *Maine* v. *Grand Trunk Ry. Co.*, 142 U. S. 217. In that case the court sustained an act imposing a tax upon persons or corporations operating railroads as an excise for the privileges of exercising such franchises in the state of Maine, the amount of the excise tax being a certain percentage of the gross transportation receipts. The court says:

"As the granting of the privilege rests entirely in the discretion of the state, whether the corporation be of domestic or foreign origin, it may be conferred upon such conditions, pecuniary or otherwise, as the

state in its judgment may deem most conducive to its interests or policy. It may require the payment into its treasury, each year, of a specific sum, or may apportion the amount exacted according to the value of the business permitted, as disclosed by its gains or receipts of the present or past years. The character of the tax, or its validity, is not determined by the mode adopted in fixing its amount for any specific period or the times of its payment.

"The court below held that the imposition of the taxes was a regulation of commerce, interstate and foreign, and therefore in conflict with the exclusive power of congress in that respect; and on that ground alone it ordered judgment for the defendant. This ruling was founded upon the assumption that a reference by the statute to the transportation receipts and to a certain percentage of the same in determining the amount of the excise tax, was in effect the imposition of the tax upon such receipts, and therefore an interference with interstate and foreign commerce. But a resort to those receipts was simply to ascertain the value of the business done by the corporation, and thus obtain a guide to a reasonable conclusion as to the amount of the excise tax which should be levied; and we are unable to perceive in that resort any interference with transportation, domestic or foreign, over the road of the railroad company, or any regulation of commerce which consists in such transportation. If the amount ascertained were specifically imposed as the tax, no objection to its validity would be pretended. And if the inquiry of the state as to the value of the privilege were limited to receipts of certain past years instead of the year in which the tax is collected, it is conceded that the validity of the tax would not be affected; and if not, we do not see how a reference to the results of any other year could effect its character. There is no levy by the statute on the receipts themselves, either in form or fact; they constitute, as said above, simply the means of ascertaining the value of the privilege conferred."

This distinction between a tax and an amount collected as compensation for value received, is

well illustrated in the decisions of this court relative to tonnage duties. While tonnage duties are prohibited, duties where the sum collected is determined upon the tonnage capacity of vessels, and which, so far as the manner of collection and method of determining the amount are concerned, are precisely like tonnage duties, are sustained when such collections are in fact compensation for wharfage, pilotage and increased facilities for commerce.

See:

Huse v. *Grorer*, 119 U. S. 543, 548, and cases cited.

Wauchita Packet Co. v. *Aiken*, 121 U. S. 444.

Steamship Co. v. *Portwardens*, 6 Wall. 31.

We submit, therefore, that the gross earnings law of North Dakota is not void as a regulation of interstate commerce.

QUESTION V.

IS CHAPTER 107 OF THE LAWS OF DAKOTA FOR 1889, BEING AN ACT ENTITLED "AN ACT PROVIDING FOR THE LEVY AND COLLECTION OF TAXES UPON THE PROPERTY OF RAILROAD COMPANIES IN THIS TERRITORY," APPROVED MARCH 7, 1889, IN CONFLICT WITH THE VTH AND XIVTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, AND VOID IN SO FAR AS IT ATTEMPTS TO EXEMPT FROM TAXATION THE LANDS GRANTED BY CONGRESS BY THE ACT APPROVED JULY 2, 1864, TO AID IN THE CONSTRUCTION OF THE NORTHERN PACIFIC RAILROAD?

That the language of the "gross earnings" law of 1889 sufficiently shows the intention of the legislature to exempt from taxation lands held by appellant under the act of July 2, 1864, should its terms become applicable to the Northern Pacific by due acceptance of and compliance with its provisions, is not questioned. Moreover, whatever doubt might otherwise exist, is set at rest by the decision of the supreme court of North Dakota in *N. P. R. R. Co.* v. *Barnes, County Treasurer of McLean county*, 51 N. W. Rep. 386, construing the act of the territory of Dakota, approved March 9, 1883, where provisions like those found here, were held to exempt lands. By this decision, so far as it determines the meaning of the territorial act, the Federal courts are bound.

Stutsman County v. *Wallace*, 142 U. S. 293, 306.

And such intention must be given effect unless it is in conflict with the Federal constitution or the organic act. The provisions of the Federal constitution which it is contended by appellees are violated by this act, are the Vth and XIVth amendments. The provisions of these amendments, so far as they affect this question are the same, the sole distinction being that the one is a limitation upon the power of congress, the other upon the states. Accordingly in this discussion I shall consider the XIVth amendment only. The first section of this amendment, the material one, provides:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

That this prohibition upon the power of the states to enact laws, applies to tax legislation, is beyond question. But the impossibility of laying down a general rule or definition on the subject which would include all tax laws that might be obnoxious to its provisions, is apparent; and the courts have wisely refused to attempt such task. Each case must be decided as it arises. Many cases, however, have arisen requiring in their decision a construction of this amendment, and certain principles have been announced by the courts in connection therewith, by which we can determine if the

"gross earnings law" is within the prohibition. It is settled by repeated decisions that this amendment in nowise affects the right of the state to adjust its system of taxation, in all reasonable ways, to suit itself. It may, within reasonable limits, classify the taxable property for purposes of taxation; and may, subject of course to the provisions of its own constitution, exempt certain classes from taxation and commute the tax on other classes. It may impose specific taxes upon different trades, and may vary the rates of excise upon various products; it may tax real estate and exempt personal property, or *vice versa*; it may tax securities for indebtedness, or not tax them; it may tax mortgages on real property, and not tax chattel mortgages. And such taxing law will not contravene this amendment.

Bell's Gap R. R. Co. v. Penn, 134 U. S. 232, 237.

Home Ins. Co. v. New York, 134 U. S. 594, 606 7.

Pacific Express Co. v. Seibert, 142 U. S. 339, 350-1.

Pacific Express Co. v. Seibert, 44 Fed. Rep. 310, 316.

State Board of Assessors v. State, (N. J.) 24 Am. and Eng. R. R. Cases, 546.

N. P. R. R. Co. v. Barnes, (N. D.) 51 N. W. Rep. 386, 393.

It is not disputed that railroad corporations, by their peculiar status, by the purposes of their organization, by their methods of opera-

tion, by their obligations to the public, by the powers conferred upon them, are, and have been since the beginning, set apart as a class by themselves. As such class they may be taxed in a manner peculiar to themselves, and the taxing law will not be repugnant to this amendment.

Kentucky Railroad Tax Cases, 115 U. S. 321, 336.

State R. R. Tax Cases, 92 U. S. 575.

Wis. Cent. R. R. Co. v. *Taylor Co.*, (Wis.) 8 N. W. Rep. 833.

State Board of Assessors v. *State*, (N. J.) 24 Am. and Eng. R. R. Cases, 546.

N. P. R. R. Co. v. *Barnes*, (N. D.) 51 N. W. Rep. 386, 393.

Francis v. *A., T. & S. F. R. R. Co.*, 19 Kas. 303.

A. & F. R. R. Co. v. *Wright*, (Ga.) 13 S. E. Rep. 578.

Mo. Pac. R. R. Co. v. *Humes*, 115 U. S. 512.

Dow v. *Beidelman*, 125 U. S. 680.

M. & St. L. R. R. Co. v. *Beckwith*, 129 U. S. 26.

Pacific Express Co. v. *Seibert*, 142 U. S. 339, 350.

M. & St. L. R. R. Co. v. *Emmons*, 149 U. S. 364, 366.

L. R. & S. F. R. R. Co. v. *Hanniford*, (Ark.) 5 S. W. Rep. 294.

Hare's Am. Const. Law, 293-4, 296-7.

These propositions have not been questioned by appellees heretofore, and we presume they will not be now. The circuit judge also conceded

these points. *N. P. R. R. Co.* v. *Walker*, 47 Fed. Rep. 681, 685. But while conceding that railroads may be classified by themselves for the purpose of taxation, it is insisted that such classification must be restricted to what is called "railroad property," that is, to property which is essential to the discharge of the functions and duties of the railroad company as a common carrier; and that the lands owned by virtue of a grant cannot be taxed except as other lands. This contention, as stated by the court below, is as follows:

> "Property of the same kind, in the same condition, and used for the same purpose, must be taxed by a uniform rule, without regard to its ownership. * * While property may be classified for the purposes of taxation, between the subjects of taxation in the same class there must be equality. Property of the same kind, and in the same condition, and used for the same purpose, cannot be divided into different classes for the purposes of taxation, and taxed by a different rule, because it belongs to different owners. * * It was not competent for the legislature, either under the organic act or the fourteenth amendment of the constitution of the United States to classify the lands in the territory, for purposes of taxation, into lands owned by railroad companies and lands owned by all other persons, and declare that the former should not and the latter should be, taxed."
>
> *N. P. R. R. Co.* v. *Walker*, 47 Fed. Rep. 681, 686.

We challenge both the correctness of the rule as stated, and its application to the facts presented by the case.

1. LANDS HELD LIKE THOSE GRANTED TO THE NORTHERN PACIFIC RAILROAD COMPANY ARE "RAILROAD PROPERTY."

Corporations are creatures of the law. They possess such powers only as are directly granted by the charter, or are necessarily implied to enable them to perform their prescribed duties. But beyond these limits they are powerless to act.

Boone on Corporations, chap. IV.

Thomas v. *R. R. Co.*, 101 U. S. 71, 82.

Morawetz on Corporations, § 316-320.

By necessary implication all corporations are vested with power to take and hold such property, personal or real, as reason or common usage declares is essential to the proper and convenient exercise of their corporate powers. A railroad company is necessarily authorized to acquire and hold land required for the carrying on of its business in a reasonably convenient manner; but no more. It cannot, without special authorization, acquire or hold land for speculation.

Pacific R. R. Co. v. *Seeley*, 45 Mo. 212.

Coleman v. *S. R. T. R. Co.*, 49 Cal. 517, 522.

Rensselaer, etc. R. R. Co. v. *Davis*, 43 N. Y. 137.

Oceum Co. v. *Sprague Mfg. Co.*, 34 Conn. 529, 541.

And whether a corporation is authorized to hold land under its charter for the purposes for which it is seeking to hold it, is necessarily a question for the courts to decide when properly brought before them. But when a corporation is created, under general laws or by special charter, for a specific purpose, the legislature is the judge of what is necessary to the due and proper performance of the duties imposed by it upon its creation; and it does not lie in the mouth of the courts to say that franchises or other property given by the legislature to aid in the attainment of the end sought, are unessential to enable the corporation to discharge its functions and duties. The fact that such functions and duties might be performed without such aid is immaterial. If the legislative body has decided that such aid is essential either to the performance, or to the more convenient performance, that decision is conclusive. Thus, although a right of way of fifty feet is ordinarily sufficient, and one of a hundred feet will answer every practical purpose, yet when congress grants to the Northern Pacific a right of way four hundred feet in width, it decides that such width is essential to the due performance of the duties imposed upon the grantee; and the courts have no jurisdiction to determine that a less width is sufficient and that all beyond that less width is non-essential to the fulfillment of those duties and hence is "property of a railroad company"

and not "railroad property," although, as is the fact, almost that entire width lies idle, and is in no wise connected with or essential to the use or operation of the railroad.

By the act of congress approved July 2, 1864, congress created the Northern Pacific Railroad Company for a specific purpose. That purpose is clearly set forth in the act: "to lay out, locate, construct, furnish, maintain and enjoy a continuous railroad and telegraph line, with the appurtenances, namely, beginning at a point on Lake Superior, in the state of Minnesota or Wisconsin, thence westerly by the most eligible railroad route, as shall be determined by said company, within the territory of the United States, on a line north of the forty-fifth degree of latitude, to some point on Puget's Sound, with a branch via the valley of the Columbia river, to a point at or near Portland, in the state of Oregon, leaving the main trunk line at the most suitable place, not more than three hundred miles from its western terminus;" and vested the corporation with all the powers, privileges and immunities necessary to carry into effect the porposes of the act set forth. (Section 1.)

Section 2 grants to the company a right of way four hundred feet in width, with station grounds, etc.

Section 3 grants lands to aid in the construction and operation of the road.

Section 5 prescribes the manner of constructing the railroad and telegraph line.

Section 7 vests in the grantee the right of eminent domain to aid in the construction of the road.

Section 8 requires the completion of the road within a certain time.

Section 9 prescribes the penalty for a breach of the conditions of the grant.

Section 10 provides that all the people of the United States shall have the right to subscribe for the stock; and forbids the issuance of a mortgage or construction bonds by the company except with the consent of congress.

Section 11 provides that the road, or any part thereof, shall be a post route and a military road, subject to the use of the United States for postal, military, naval and all other government service, and shall be subject to such regulations as congress may impose, restricting the charges for such government transportation.

Section 17 provides that:

"Said company is authorized to accept to its own use any grant, donation, loan, power, franchise, aid or assistance which may be granted to, or conferred upon said company by the congress of the United States, by the legislature of any state, or by any corporation, person or persons; and said corporation is authorized to hold and enjoy such grant, donation, loan, power, franchise, aid or assistance to its own use for the purpose aforesaid."

Section 20 provides:

"That the better to accomplish the object of this act, namely: To promote the public interests and welfare by the construction of said railroad and telegraph line and keeping the same in working order, and to secure to the government at all times (but particularly in times of war,) the use and benefits of the same for postal, military and other purposes, congress may, at any time, having due regard for the rights of said Northern Pacific Railroad Company, add to, alter, amend or repeal this act."

It is evident that this corporation was created for one specific, distinct purpose. Every power, franchise and aid given, looked directly to, and were granted for, the purpose of securing the construction of the railroad and telegraph line, and the keeping the same in working order. The language of section 3 of the charter is:

"That there be, and hereby is, granted to the 'Northern Pacific Railroad Company,' its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific Coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the route of said line of railway, every alternate section, etc."

Terms more expressive of the intention of congress to devote these lands to assist the railroad company in discharging its functions and duties as a common carrier by rail, could not well be used. The grant is vast, but the line to be constructed to earn it, is trans-continental. The grant was made because congress believed the public good required the road; and, in view of the length of the line, the character of the country through which it was

to pass, the paucity of settlements therein, and the direct and expressive language used in the act, the conclusion is inevitable that congress believed these lands were essential to the maintainance and operation of the road; and so believing dedicated them to that purpose. The subsequent history of the road shows that belief was well founded, and that without this assistance the road could have been neither constructed nor operated. Congress having declared these lands were essential to the operation of the road, the court has no power now to say they are not. The determination of congress is as conclusive upon this point as it is that a right of way of four hundred feet in width is essential.

We presume it will not be seriously questioned that shovels, teams and scrapers owned by the railroad company and used by it in the construction and repair of tracks, sidings, etc., are essential to the operation of the road and are properly included in a classification of "railroad property," or money in its hands used to carry on its business, and under an act classifying railroads and exempting them from taxation, would properly be exempted, although shovels, scrapers, teams and money in the hands of private individuals are taxable. Yet what distinction can be drawn between the shovels, scrapers, teams, or the money by which they are rendered obtainable, and a fund of lands granted by congress for the express purpose of

enabling the railroad company to operate its road by procuring these and other reasonable articles? Had congress seen fit to aid the construction and maintenance of this road by a direct grant of money, would it be contended that such money could not properly be included in a classification of "railroad property?" Yet in what can the grant of these lands be distinguished from such money grant?

And we assert as a principle of law that when property, as a land grant, is devoted by law to a particular purpose and held subject to the accomplishment of that purpose, it may be classified by that fact alone and taxed or exempted from taxation as the legislature shall see fit.

University v. *People*, 99 U. S. 309.

State v. *Lester*, 29 N. J. L. 541.

2. THE STATE MAY CLASSIFY PROPERTY OWNERS ON GROUNDS OF ESSENTIAL DISTINCTIONS IN NATURE, WHEREBY THE USE OF THE PROPERTY OWNED, AND THE CONDITIONS TO WHICH IT IS SUBJECT, ARE NECESSARILY VARIED; OR MAY CLASSIFY SUCH OWNERS ON VARIOUS GROUNDS OF PUBLIC POLICY DEEMED SUFFICIENT BY THE LEGISLATURE; AND MAY CLASSIFY PROPERTY FOR TAXATION BY VIRTUE OF SUCH OWNERSHIP.

A very brief examination of the tax legislation and litigation of the country is sufficient

to establish that the rule laid down by the learned circuit judge, and contended for by appellees, that the XIVth Amendment forbids classification of property by ownership for the purposes of taxation, is new to laymen, legislators and to courts; and we think we can show that the contrary, almost universal, construction of that amendment is correct in principle. Our contention is that the law contemplates a classification of owners by reason of certain distinctions such as the services they have performed, or may be performing, for the state; or because of essential distinctions in nature, as between a corporation and a natural person; and permits property to be classified by virtue of such ownership.

Thus, a classification of property as the property of members of the National Guard, is recognized. In many of the states members of the militia or fire departments are exempt from poll tax. Exemptions from taxation of all the property of certain charitable or educational institutions have been sustained. Property in the hands of ministers has been classified for purposes of taxation differently from similar property in the hands of laymen. The law, in some cases, has classified property of old soldiers for taxation.

Such classification is not unusual. It was known to the states, as well as to the national government, at the time of the adoption of the XIVth Amendment, and had the sanction of a

long continued and well recognized usage. Thus by the 5th subdivision of the 6th section of the act of congress approved March 3, 1845, 5 Stat. 789, congress imposed the following condition upon the state of Iowa:

"That the bounty lands granted, or hereafter to be granted, for military services during the late war, shall, while they continue to be held by the patentees or their heirs, remain exempt from any tax laid by order or under the authority of the state, whether for state, county or township, or for any other purpose, for the term of three years after the date of the patents, respectively."

This exemption was purely by virtue of ownership and did not follow the land into the hands of a purchaser.

Sands v. *Adams Co.*, 11 Ia. 577.

See also sec. 11, act of March 2, 1819, 3 Stat. 495.

Probably in every state in the Union, exemptions of property from taxation, by reason of belonging to some institution which it was considered good public policy to encourage, or as a reward for public services, was recognized at the time of the adoption of the XIVth Amendment.

See act of the legislature of Alabama, approved January 27, 1845, commuting taxes upon the property of the state bank.

Dyer v. *The Br. Bank of Mobile*, 14 Ala. 624.

By the second section of an act approved April 8, 1869, the legislature of Arkansas re-

quired every railroad company in the state to furnish to the auditor a list of lands acquired by grant, donation or subscription, in aid of the construction of its road; and such lands were not to be listed or subjected to taxation until conveyed to actual purchasers by said company.

Cairo & Fulton R. R. Co. v. Parks, 32 Ark. 131.

In *M. & L. R. R. Co.* v. *Berry*, 41 Ark. 436, certain exemptions granted by the Arkansas legislature January 11, 1853, were held personal to the owners.

See also:

St. L. I. M. & S. Ry Co. v. Berry, 41 Ark. 509.

By an act passed in 1864, the legislature of Connecticut provided that a tax imposed upon the amount of the capital stock of certain corporations at its market value, and their funded and floating debt, should "take the place and be in lieu of all other taxes on railroads and horse railroad property and franchises within this state." It was held that this tax was in lieu of taxes upon all property which a railroad company might lawfully own, not simply such as was necessary to the conduct of the railroad business; that it was an exemption based upon ownership and not upon use.

Osborn v. N. Y. & M. R. R. Co., 40 Conn. 491.

This act was re-enacted, with slight changes, in 1865, 1866 and 1867.

In *City Council* v *G. R. R. & B. Co.*, 26 Ga. 651, an exemption by reason of ownership was sustained.

By section 22 of the act of the General Assembly of Illinois, approved February 10, 1851, creating the Illinois Central R. R. Co., it was provided that "lands selected under said act of congress (act of September 20, 1850) and hereby authorized to be conveyed, shall be exempt from all taxation under the laws of this state, until sold or conveyed by said corporation," etc.

Ill. Cen. R. R. Co. v. *McLean Co.*, 17 Ill. 291.
Ill. Cen. R. R. Co. v. *Goodwin*, 94 Ill. 262.

See also Rev. St. of Illinois, section 2 of Revenue Law, enacted since the adoption of the XIVth Amendment.

Also exemption construed in *University* v. *People*, 99 U. S. 308.

By section 15 of "An act to corporate the Farmer's Bank of Kentucky," p. 7, Session Acts of 1849-50, it was provided that 50 cents paid on each $100 of paid in stock, should be paid in full of all taxes. It was held under this act that lands acquired by the bank, but not used in its business, were exempt.

Farmers' Bank of Kentucky v. *Commonwealth*, 6 Bush. 127.

See also:

N. L. & B. Institution v. *Commonwealth*, 14 B. M. 214.

Section 711 of the Revision, Iowa, exempts "The polls or estates, or both, of persons who, by reason of age or infirmity may, in the judgment of the assessor, be unable to contribute to the public revenue."

Ordway v. *Smith*, (Ia.) 5 N. W. Rep. 797.

The statutes of Dakota contain a similar provision.

Sec. 2, Chap. 69, Laws of 1862.

Sec. 3, Chap. 24, Laws 1865-6.

Sec. 3, Chap. 23, Laws of 1866-7.

Sec. 1, Chap. 25, Laws of 1868-9.

Sec. 2, Chap. 28, Political Code of 1877.

Sec. 1542, Compiled Laws of 1887.

It is decided that under section 787 of the code of Iowa all property, including the dwellings of clergymen, *owned* by religious societies and used exclusively for such purpose without income to the owner, is exempt from taxation; but that the same property, used for the same purpose, and also without income to the owner, is taxable if the title be in a private citizen.

Trustees of Griswold College v. *Iowa*, 46 Ia. 275.

Laurent v. *Muscatine*, 59 Ia. 404.

By section 37 of the tax law of 1876 (Laws of 1876, p. 67) the legislature of Kansas required railroad property outside of the limits of organized counties to be taxed, although similar property of private individuals escaped.

Francis v. *A. T. & S. F. R. R. Co.*, 19 Kas. 305.

In Maine, lands owned by the state of Massachusetts are exempt from taxation; and all the real and personal property of literary, benevolent, charitable and scientific institutions, incorporated by that state, are classed together and exempted from taxation.

Portland v. *Water Co.*, 67 Me. 135.

The legislature of Michigan, by acts approved February 5 and 12, 1853, provided for the construction of a canal around the falls of St. Mary in that state, paying the contractors therefor in lands donated by congress for that purpose by act approved August 26, 1852. In the construction contract it was provided that all taxes on the lands turned over to the contractors should be remitted for five years; provided that whenever such lands were sold by the contractors to other persons they should thereafter be subject to taxation.

And by act No. 36 of the legislature of Michigan of 1873, as amended by act No. 81 of the laws of 1875, certain lands granted to aid in the construction of a railroad, were exempted from taxation while they remained unsold by the railroad company. These acts are still in force.

The People v. *Auditor General*, 7 Mich. 89.

Board of Supervisors v. *Auditor General*, 65 Mich. 408.

In Minnesota many laws substantially like the gross earnings law under consideration, exempting land grants as well as other property

of railroad companies, in consideration of a percentage of the gross earnings, have been enacted and are in force.

Act apprv'd	Mar.	22,	1857,	Laws of 1857 (ex. sess.)	p. 1
" "	"	8,	1861,	" 1861,	p. 229
" "	"	8,	1861,	" 1861,	p. 213
" "	"	10,	1862,	" 1862,	p. 226
" "	"	10,	1862,	" 1862,	p. 237
" "	"	6,	1863,	" 1863,	p. 237
" "	"	4,	1864,	" 1864,	p. 148
" "	"	4,	1865,		
" "	Feb.	23,	1865,	Sp. Laws of 1865,	p. 21
" "	March	4,	1865,	" 1865,	p. 37
" "	"	3,	1866,	" 1866,	p. 25
" "	"	10,	1870,	" 1870,	p. 338

These privileges had theretofore been granted to special corporations, but by act approved March 18, 1873, (Sp. Laws 1873, p. 302), the legislature, in consideration of a percentage of gross earnings, exempted from all taxation the "railroad, its appurtenance and appendages, and all other property, estate and effects of said corporation held or used for, in, or about the construction, equipment, renewal, repair, maintaining or operating its railroad, *including the lands granted to said company to aid in the construction of said railroad*," etc., of the St. Paul, Stillwater & Taylor's Falls R. R. Co.; and by the second section, provided that any railroad company owning or operating, or which might thereafter own or operate, any line or lines of railroad in Minnesota, might, by resolution of

its board of directors, accept and become subject to the provisions of this act. And by an act approved March 7, 1887, (Gen. Laws, 1887, p. 67,) this system of taxation was extended to all railroads in the state.

These acts have been repeatedly upheld by the courts:

First Division St. P. & P. R. R. Co. v. *Parcher*, 14 Minn. 297.

State v. *W. & St. P. R. R. Co.*, 21 Minn. 315.

State v. *Trustees*, 21 Minn. 344.

C. M. & St. P. R. R. Co. v. *Pfaender*, 23 Minn. 217.

City of St. Paul v. *St. P. & S. C. R. R. Co.*, 23 Minn. 470.

State v. *N. P. R. R. Co.*, 32 Minn. 294.

County of Hennepin v. *St. P. M. & M. Ry Co.*, 33 Minn. 534.

County of Ramsey v. *C. M. & St. P. Ry Co.*, 33 Minn. 537.

The legislature of Mississippi, in the charter of the Grand Gulf & Port Gibson Railroad Company, provided that "the capital stock of said company, and all other property belonging to or connected with said railroad, shall be exempt from all taxation," etc. (Acts of 1866, p. 137.)

In New York the personal property and real estate of a minister, when occupied by him, were exempt from taxation to the amount of $1500. 1 R. S. 386, sec. 4.

By section 253 of the Military Code of 1870,

laws of 1870, p. 282, members of the National Guard of the state of New York were allowed a deduction of $1,000 from the assessed valuation of their real and personal property.

□ By the statute of March, 1831, (32 Ohio Stat. 372-3, sec. 2) the legislature of Ohio exempted from taxation all lots of land or ground set apart for school houses, academies or colleges, with the buildings thereon occupied for those purposes, and all lands the property of any such academy or other seminary of learning, which then was or thereafter might be established in the state.

By an act approved March 1, 1780, the legislature of Pennsylvania provided that "all lands which have been, or may hereafter be granted within the state to any officer or soldier of the line of this state * * * as a reward for their services shall be and are hereby exempted from taxation for and during the life of such officer or soldier, respectively, unless the same shall be transferred or aliened to any other person." And the act of the 16th March, 1785, sec. 33, contains the same provision.

This exemption was purely personal and ceased with a change of the ownership.

Finney v. *Commissioners*, 1 S. & R. 63.

Coney v. *Owens*, 6 Watts. 435.

Kelsey v. *Badger*, 7 Watts. 516.

Sanford v. *Decamp*, 8 Watts. 542.

In South Carolina the property of religious societies, whether used for religious purposes or not, was exempt from taxation.

City Council v. *Vestry of St. Phillip's Church*, McMullen's Eq. 139.

By an act approved March 10, 1875, the legislature of Texas granted certain lands to the International and Great Northern R. R. Co., and exempted the same from taxation for twenty-five years.

I. & G. N. R. R. Co. v. *Anderson Co.*, 59 Tex. 654.

Section 270 R. L. Vermont, provides that the following property shall be exempt from taxation: "Real or personal estate granted, sequestered or used for public, pious and charitable uses * * * and lands *owned* or leased by colleges, academies or other public schools," etc.

The supreme court of Vermont, construing this statute, held that lands owned by an academy, incorporated as a private corporation for the purposes of general education, though not used for educational purposes, were exempt.

Willard v. *Pike*, 59 Vt. 217.

The Tennessee constitution of 1870 provides that $1,000 of personal property in the hands of each tax payer, and the direct product of the soil, *in the hands of the producer and his immediate vendee*, may be exempted from taxation.

In chapters 314 and 362, P. & L. laws of 1866, conferring the lands granted by act of congress approved May 5, 1864, to aid in the construction of a railroad, upon the beneficiaries selected, the legislature of Wisconsin provided that the lands granted should be exempt from all taxation for the term of ten years, "unless said company shall sooner sell or convey the same; and so much of said lands as shall be sold or conveyed by said company within said ten years shall be subject to assessment and taxation." This exemption was extended three years by chapter 21, laws of 1877.

Wis. Cen. R. R. Co. v. *Lincoln Co.*, 57 Wis. 140.

By an act entitled, "An act to provide for the levy and collection of taxes upon the property of railroad companies in this territory," approved November 28, 1883, the legislature of the territory of Washington provided for the exemption from taxation of all property of railroad companies, in consideration of the payment of a certain percentage of the gross earnings of such railroad. This act was held to be constitutional and to exempt the land grant of the Northern Pacific from taxation, in an unpublished opinion rendered by Chief Justice Green, sitting as a district judge. It is also sustained by the supreme court of the state of Washington in an opinion rendered July 11, 1893. See exhibit "A" attached to this argument.

Prior to the adoption of the XIVth amendment the supreme court of Kentucky, speaking of the necessity for equality and uniformity in taxation, says:

"Taxation may not be universal, but it must be general and uniform. Thus if a capitation tax be laid, none of the class of persons thus taxed can be constitutionally exempt upon any other ground than that of public service; and, if a tax be laid on land, no appropriation land within the limits of the state can be constitutionally exempted, *unless the owner be entitled to such immunity in consequence of public service.*"

City of Lexington v. *McQuillan's Heirs*, 9 Dana 517.

For other cases recognizing and sustaining the right of the state to classify property for taxation by virtue of its ownership, where deemed advisable on grounds of public service, or because of essential distinctions in the nature of the owner, etc. See:

Wis. Cen. R. R. Co. v. *Taylor Co.*, 52 Wis. 90; 8 N. W. Rep. 833.

N. P. R. R. Co. v. *Barnes*, (N. D.) 51 N. W. Rep. 386.

State Board v. *Central R. R. Co.*, 48 N. J. L. 146; 24 Am. and Eng. R. R. Cases 456.

The Kittanning Coal Co. v. *Commonwealth*, 79 Penn. St. 100.

People, ex rel., Oakhill Cemetery Association, v. *Pratt*, (N. Y.) 29 N. E. Rep. 7.

It would be as easy as useless to add to these examples. Every act exempting from taxation, or affecting the taxation of special corporations

or institutions, involves a classification by ownership and because of ownership, and the reports of the decisions of this court abound in such examples. In *The Delaware Tax Case*, 18 Wall. 206, 225, the court says:

"It has also been repeatedly held by this court that the legislature of a state may exempt particular parcels of property or the property of particular persons or corporations from taxation, either for a specified period or perpetually."

Many of these instances are of legislation and decisions antedating the adoption of the XIVth amendment. They establish that at that time this species of classification by ownership for taxation, was common. The very number of instances prove that the wisdom of successive legislatures had approved its reasonableness. Especially, it would appear, have legislatures regarded with favor a classification by which lands granted to aid in works of internal improvement were exempted from taxation, or the tax thereon commuted, while they remained in the hands of the original grantee.

Was it the intention to prohibit this kind of discrimination by the XIVth amendment; to prevent the states from so rewarding their citizens for public services, or from encouraging in this manner works or pursuits tending to the public benefit; to forbid a class of legislation approved by the wisdom of successive legislatures and courts? We cannot think such was its purpose or effect. This court, speaking of this amendment, says:

"But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the state * * to legislate so as to increase the industries of the state, develop its resources and add to its wealth and prosperity."

Barbier v. *Connoly*, 113 U. S. 27, 31.

And in determining whether an act like the "gross earnings law" is in the line of a wise public policy, the judgment of the legislature as shown by the enactment is necessarily conclusive.

Again the court says:

"The provision in the XIVth amendment, that no state shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, or the people of the state in framing their constitution. But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition. It would however, be impracticable and unwise to attempt to lay down any general rule or definition on the subject, that would include all cases. They must be decided

as they arise. We think that we are safe in saying that the XIVth amendment was not intended to compel the states to adopt an iron rule of equal taxation. If that were its proper construction, it would not only supersede all those constitutional provisions and laws of some of the states, whose object is to secure equality of taxation, and which are usually accompanied with qualifications deemed material; but it would render nugatory those discriminations which the best interests of society require, which are necessary for the encouragement of needed and useful industries, and the discouragement of intemperance and vice, and which every state, in one form or another, deems it expedient to adopt."

Bells Gap R. R. Co. v. Penn., 134 U. S. 232, 237.

Let us apply the tests here suggested for determining if an act be within the prohibition of the XIVth amendment. The examples cited of classification by ownership, for purposes of taxation, establish that the "gross earnings law" is not legislation of an "unusual character, unknown to the practice of our government." It is clearly within the line of "general usage," and its reasonableness cannot be impeached without an indictment against the wisdom of the legislature of every state in the Union, where similar legislation has been had, and this, I believe, includes every state in the Union. We shall hereafter show it does not constitute a clear and hostile discrimination against any particular person or thing; indeed, that the law under consideration does not necessarily make any discrimination.

The examples cited establish not only that

this species of classification by ownership was common before the adoption of the XIVth amendment, but they also establish that it has been a matter of very common occurrence since that time. The legislature is a co-ordinate branch of the government. It is not less bound to uphold the constitution than are the courts. What that constitution is, it is presumed to know; and in holding an act unconstitutional, the court necessarily holds that this co-ordinate branch of government either deliberately violates the supreme law of the land, or was ignorant of its meaning. A court will long hesitate in the face of these alternatives before impeaching its equal. And legislative enactments necessarily embodying a constitutional construction are entitled to great respect by the courts in determining the meaning of a constitutional provision. Particularly is such construction entitled to great weight when it is contemporaneous and long continued, as has been this construction of the XIVth amendment.

McPherson v. *Blacker*, 146 U. S. 1, 27.

McCulloch v. *Maryland*, 4 Wheat. 316, 401.

Sutherland on Stat. Const., sec. 307, 309, 311, and cases cited.

Nor does this legislative construction of the XIVth amendment stand alone. The XIVth amendment was finally proclaimed and adopted July 28, 1868. Since that time many acts prac-

tically identical with the "gross earnings law" have been passed in the various states; also many other acts exempting property from taxation by reason of ownership, based upon a desire to reward the owner for public services or to encourage such owner in the prosecution of works deemed of public benefit. Such acts have been repeatedly assailed upon various grounds; but until the present case, we believe, never upon the ground that they were in conflict with this amendment, and certainly they have never been held void for such conflict. The decision of the circuit court in this case is absolutely without precedent. Appellees in their briefs have heretofore cited (and we presume will here cite) many cases where courts have held that statutes exempting property from taxation do not include in the exemption property not essential to the proper business of the exempted property owner.

State v. *Commissioners*, 23 N. J. L. 510.

State v. *Hancock*, 33 N. J. L. 315.

State v. *Newark*, 2 Dutch. 519.

State v. *Flavell*, 24 N. J. L. 370.

State v. *Fuller*, 40 N. J. L. 328.

Bank v. *State*, 104 U. S. 493.

County of Todd v. *St. P. M. & M. Ry. Co.*, (Minn.) 36 N. W. Rep. 109.

County of Ramsey v. *C. M. & St. P. R. R. Co.*, (Minn.) 24 N. W. Rep. 313.

State v. *N. P. R. R. Co.*, (Minn.) 38 N. W. Rep. 635.

It is not a difficult task to add to the list.

Ill. Cen. R. R. Co. v. *Decatur*, 147 U. S. 190, 203.

Vermont Cent. R. R. Co. v. *Burlington*, 28 Vt. 193.

Tucker v. *Ferguson*, 22 Wall. 527.

St. L. I. M. & *S. Ry. Co.* v. *Loftin*, 98 U. S. 559.

Railroad Company v. *Loftin*, 105 U. S. 258.

Gibbons v. *District of Columbia*, 116 U. S. 404.

West Wis. R. R. Co. v. *Trempealeau*, 93 U. S. 595.

Morris v. *Lone Star Chapter*, (Tex.) 5 S. W. Rep. 519.

Many other cases may easily be cited.

But mark, in each and every one of these cases the decision has turned upon the construction of the exempting statute, whether it was the *intention* to include the outside property in the exemption. Here we have the surprising spectacle of numerous actions, many of them most important, brought to determine if certain property be taxable or not, where every point that could be suggested by the ingenuity of most eminent counsel is urged with the utmost force before the leading courts of the land, and not one whisper or suggestion by counsel or court that the exempting statute was in conflict with the XIVth amendment, although, if the position of counsel for appellees and of the learned circuit judge be correct, that proposition must have completely deter-

mined each and every of these actions. These authorities conclusively determine that by the common judgment of the bench and bar, such legislation is not violative of this amendment. It is difficult to over-estimate the weight and importance that should be given to this almost universal construction. Certainly nothing less than the clearest and strongest case should be permitted to prevail against it.

The consequences of reversing this practical construction that has now obtained for so many years,may well be considered in connection with the doctrine of *stare decisis*. Under that construction, and statutes enacted pursuant thereto, vast properties have been, and are, annually intentionally omitted from the assessment roll; unlawfully so if that construction be incorrect; and by that means the taxes against the remaining property owners greatly increased, and necessarily rendered void as depriving them of the equal protection of the law. Every general tax sought to be levied since 1868 in states where such legislation was in force (and I believe that includes nearly every state) was and is void. In Minnesota, Michigan, Illinois, Wisconsin, Washington and Texas, laws substantially identical with the law of Dakota, in question, have been in force. If that law is obnoxious to this amendment, so are these laws. If that law falls, so do these; and with them fall the taxes actually levied for those years, the tax titles and every proceeding

and property right connected with or growing out of such taxes.

Kneeland v. *City of Milwaukee*, 15 Wis. 454, 458.

Opinion on rehearing, id. 468, 471-2.

Weeks v. *City of Milwaukee*, 10 Wis. 242, 264.

Hassen v. *Rochester*, 65 N. Y. 519.

Francis v. *A. T. & S. F. R. R. Co.*, 19 Kas. 303, 308.

Cooley on Taxation, 215, (2nd ed.)

It is no answer to this assertion of the effect of such omissions, to say they were made under error of law. Everyone is conclusively presumed to know the law. A premium cannot be placed upon ignorance, and a municipal corporation cannot, more than other corporations, do a wrong and shield itself behind the ignorance of its agents.

The consequence of a final decision sustaining the decision of the court below on this amendment, would be ruinous in many of the states. Reaching beyond state lines, it would amount to a national calamity. In *Kneeland* v. *City of Milwaukee*, 15 Wis. 454, 468, the court, in view of far less weighty considerations, held that it was their duty to apply the doctrine of *stare decisis* and follow a construction of the constitution of Wisconsin which the members of the court believed to be erroneous. And were there no other reason, the court should for this cause, sustain this practical con-

struction of the XIVth amendment that has obtained from the beginning.

Turning from authority to principle, it is evident that the use and conditions surrounding land or other property may necessarily so vary in the hands of one owner from its use and conditions in the hands of another, as to justify a different classification for the purposes of taxation.

The use of, and conditions surrounding the ownership of land grants by railroad companies, necessarily vary greatly from the use of and conditions surrounding the ownership of the same lands after they have been transferred to private individuals. Lands granted to and accepted by railroad companies, to aid in the construction of railroads, are held subject to conditions peculiar to themselves, to-wit: that the road shall be constructed and operated. That should a railroad company having such a grant cease to keep up and operate its railroad line, the grantor could resume the lands granted and then unsold and undisposed of, is unquestionable.

U. S. v. W. U. T. Co., et al, 50 Fed Rep. 28.

Un. Pac. Ry. Co. v. Peniston, 18 Wall. 5.

St. P. & P. Ry. Co. v. N. P. R. R. Co., 139 U. S. 1.

W. U. Tel. Co. v. Un. Pac. Ry. Co., 1 McCrary 581, 586.

No such duties are imposed on other land owners.

The use of lands held by a railroad company under a grant is necessarily different from the use of other lands. Such use is bounded by the narrow limits of the corporate powers of the grantee and the purposes for which the grant was made. Practically, if not theorectically, this amounts simply to a right to sell. That appellant cannot turn farmer and cultivate its own farms in North Dakota; or cattle raiser, and devote its immense ranges in Montana to feeding its own herds; or lumberman, and undertake to supply the market from its timber lands, is too plain for question. Such acts are, as to it, *ultra vires*. Its lands were not granted to permit it to enter the various industrial fields as a gigantic competitor, crushing out by its very size all competition and creating a great monopoly; and it cannot use them for such purpose. Its use of them is limited to procuring by their sale the financial means to construct its road and maintain the same.

That such peculiar use and conditions arising from the status of the owner, justify a peculiar classification for taxation, see *People* v. *Pratt*, 29 N. E. Rep. 7; *State* v. *Lester*, 29 N. J. L. 541.

The "Gross Earnings law" is not in conflict with the XIVth amendment unless it so discriminates against other tax payers as to deprive them of the equal protection of the law; and it must appear upon the face of the law that such a discrimination is its necessary result. It is not sufficient that a law may possibly re-

sult in discriminations against one party or another, such result being dependent on varying facts. The court cannot take testimony for the purpose of ascertaining whether in any particular year a tax law operated with uniformity upon all people or property, and hold the law constitutional or unconstitutional for that particular year, as the result shall indicate. And where an exemption rests in contract and is given for valuable considerations, either public benefits, or cash donations and public benefits, as here, considerations which the legislature deems the full equivalent of the taxes released, the court cannot say such considerations are inadequate, and that the law discriminates against other tax payers. If the percentage of gross earnings paid by the railroad company should equal or exceed the amount of taxes that would be due from its taxable property taxed as other property is taxed, (as was the case here in 1889,) there could certainly be no discrimination against other tax payers; and certainly no violation of the XIVth amendment. This proposition will hereafter be consider further in connection with a discussion of the organic act of Dakota.

If the views expressed are correct, there can be no question of the right of the territory of Dakota, unless restrained by its organic act, to place railroads in a class by themselves; and to legislate concerning them "so as to increase the industries of the state, develop

the resources, and add to its wealth and prosperity," by encouraging their construction by an exemption from taxation of either "railroad property" or of any "property of a railroad" which such company may legitimately own, or in such other manner as the state may see fit. They are such *quasi* public corporations and such factors in the development of the resources of the state, that there is no longer any question of the right of the state to encourage their construction by special favors and exemptions.

QUESTION VI.

IS CHAPTER 107 OF THE LAWS OF DAKOTA FOR 1889, BEING AN ACT ENTITLED "AN ACT PROVIDING FOR THE LEVY AND COLLECTION OF TAXES UPON THE PROPERTY OF RAILROAD COMPANIES IN THIS TERRITORY," APPROVED MARCH 7, 1889, IN CONFLICT WITH THE ORGANIC ACT OF THE TERRITORY OF DAKOTA AND VOID IN SO FAR AS IT ATTEMPTS TO EXEMPT FROM TAXATION THE LANDS GRANTED BY CONGRESS BY THE ACT APPROVED JULY 2, 1864, TO AID IN THE CONSTRUCTION OF THE NORTHERN PACIFIC RAILROAD?

1.

THE ORGANIC ACT DOES NOT FORBID EXEMPTIONS FROM TAXATION.

The portion of the organic act material to be considered in this argument, is section 6:

"And be it further enacted, that the legislative power of the territory shall extend to all rightful subjects

of legislation consistent with the constitution of the United States and the provisions of this act, but no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed upon the property of the United States; nor shall the lands or other property of non-residents be taxed higher than the lands or other property of residents; nor shall any law be passed impairing the rights of private property; nor shall any discrimination be made in taxing different kinds of property; but all property subject to taxation shall be in proportion to the value of the property taxed."

12 Stat. 241.

The closing clause of this section is, to say the least, very obscure, but its meaning is made clear by its re-enactment in the Revised Statutes, as follows:

"Sec. 1925. In addition to the restrictions upon the legislative power of the territories, contained in the preceding chapter, section eighteen hundred and fifty-one, the legislative assemblies of Colorado, Dakota and Wyoming shall not pass any law impairing the rights of private property, nor making any discrimination in taxing different kinds of property; but all property, subject to taxation, shall be taxed in proportion to its value."

The taxing power is a legislative power, and can be exercised only by the legislative department of government. It is without limitation except by express constitutional provision.

Cooley on Taxation, chap. 2, *passim*, (2nd ed.)

McCullough v. *Maryland*, 4 Wheat. 316, 428, *et seq.*

Providence Bank v. *Billings*, 4 Pet. 516, 559.

State v. *Lancaster Co.*, 4 Neb. 537, 540.

State Board v. *State*, (N. J.) 24 Am. & Eng. R. R. Cases, 546, 551.

N. P. R. R. Co. v. *Barnes* (N. D.) 51 N. W. Rep. 386, 389.

State v. *Court*, 19 Ark. 360, 370.

Williamson v. *Massey*, 33 Gratt. 237, 240.

Crawford v. *Linn Co.*, 11 Or. 482, 485.

Sharpless v. *Mayor*, 21 Pa. St. 147, 160.

Williams v. *Cammack*, 27 Miss. 209, 219.

Taxation is the enforced levy by the state, by virtue of its sovereignty, for the support of the government and for all public needs, of proportional contributions from persons and property. It differs from the forced contributions, loans and benevolences of arbitrary and tyrannical periods in that the taxes are levied by authority of law and by some rule of proportion which is intended to secure uniformity of contribution; and a just apportionment of the burdens by the taxing authority is essential. The first step in such an apportionment is the selection of the subjects of taxation; the second, the determination of the rule by which the property selected is to be taxed. Says Ruggles, J., in *People* v. *Brooklyn*, 4 N. Y. 419, 426:

"The power of taxing and the power of apportioning taxation are identical and inseparable. Taxes cannot be laid without apportionment, and the power of apportionment is, therefore, unlimited, unless it be restrained as a part of the power of taxation."

"The legislature must decide when and how and for what public purposes a tax shall be levied, and must select the subjects of taxation."

Cooley on Taxation, 165, 237, (2nd ed.)

State v. *Court*, 19 Ark. 360, 370.

N. P. R. R. Co. v. *Barnes*, (N. D.) 51 N. W. Rep. 386, 389.

The power of selecting the subjects of taxation, of saying what property shall be taxed, necessarily includes the power of determining what property shall not be taxed.

"No state undertakes to tax everything which comes within the reach of the taxing power; and it would be idle as well as mischievous in the last degree if it were to attempt it. For while the state may tax all persons as such, and all property as such, it may also tax all occupations, all amusements, and the very enjoyment of customary rights and privileges, until the exactions would be oppressive from their very number when not otherwise onerous, and a free people would not endure them. The more reasonable and politic course is to select for taxation as few subjects as possible, consistent with a fair distribution of the burden."

Cooley on Taxation, 237 (2nd ed.)

All property not selected for taxation is, therefore, necessarily, exempt; and every statute for the levy of taxes is, in a sense, a statute making exemptions.

Cooley on Taxation, 171, (2nd ed.)

"The right to make exemptions is involved in the right to select the subjects of taxation and apportion the public burdens among them; and must consequent-

ly be understood to exist in the law-making power wherever it has not in terms been taken away."

Cooley on Taxation, 200 (2nd ed.)

Oliver v. *M. & L. R. R. Co.*, 30 Ark. 128, 130.

Scotland Co. v. *M. I. & N. R'y Co.*, 65 Md. 34.

State Bank v. *Knoop*, 16 How. 369, 383-4.

Williamson v. *Massey*, 33 Gratt. 237, 240.

And the sixth section of the organic act, providing, as it does, "That the legislative power of the territory shall extend to all the rightful subjects of legislation," vests in the territorial legislature the taxing power, including the right of selecting the subjects of taxation, subject to the limitation that the exercise of this power must be "consistent with the constitution of the United States, and the provisions of this act." I have endeavored to show that the exercise of this power in the enactment of the "gross earnings law" was consistent with the constitution of the United States. The limitations in the organic act to be considered are the closing clauses in section 6:

"Nor shall any law be passed impairing the rights of private property; nor shall any discrimination be made in taxing different kinds of property; but all property subject to taxation shall be taxed according to its value."

To ascertain the exact meaning of these limitations, it is advisable to note a little further the power of the legislature without them. We have seen the legislature has full power to apportion the burden. Two things are involved

in apportionment. The first is the selection of the subjects of taxation; the second, the laying down of a rule by which to measure the contribution which each of the subjects selected for taxation shall make; thus, taxes may be specific, *ad valorem* taxes, or apportioned by special benefits. They may be direct or indirect; yet other methods of apportioning the burden might easily be suggested.

Unless restricted by the constitution, it was competent for the legislature to adopt any of these methods or all of them. It could make all taxes specific or *ad valorem*; or it could enact that personal property should be taxed *ad valorem*, and real property specifically, at so much per acre; or it could go further and declare that real estate and live stock should be taxed specifically, and other property should be taxed *ad valorem*. In short, it could prescribe as many and as dissimilar rules as it chose, and its determination would be conclusive.

Cooley on Taxation, 237-8 (2nd ed.)

N. P. R. R. Co., v. *Barnes*, (N. D.) 51 N. W. Rep. 386, 389-90.

It is evident that the constitution may prescribe limitations upon the power of the legislature to select the subjects of taxation, without affecting its power to determine the rule by which to measure the contribution which each of the subjects selected shall make; and *vice versa*. A limitation upon one is not necessarily

a limitation upon the other. An inspection of the limitations contained in the organic act upon the powers of the legislature with reference to taxation shows that they do not refer to or limit its power to select the subjects of taxation, and consequent power to exempt, but have reference only to the power to determine the rule by which taxable property shall contribute.

The limitations contained in the act must be read together and the intent gathered from the whole context. The clause, "nor shall any discrimination be made in taxing different kinds of property," is modified and explained by the phrase "but all property subject to taxation shall be taxed in proportion to its value." This clause obviously applies to the *second* requisite of apportionment, and is designed to limit the legislative power to determine the rule by which taxable property shall contribute. It requires that all property *subject to taxation* shall contribute upon an *ad valorem* basis. No tax except an *ad valorem* one is permissible, no matter what kind or class of property is taxed. The phrase "subject to taxation" forbids the conclusion, however, that *all* property is commanded to be taxed. It necessarily implies that there may exist property in the territory not "subject to taxation." If *all* property within the territory is required by the organic act to be subject to taxation, the words "subject to taxation" are mere sur-

plusage. Striking them out, the limiting clauses will read "nor shall any discrimination be made in taxing different kinds of property, but *all* property shall be taxed in proportion to its value." Such a reading might justify an assertion that it was the intention to limit the power of exemption; but if we insert the words "subject to taxation" as they are inserted in the organic act, we must read the act differently, or we make these words meaningless surplusage. This the rules of construction forbid if they can be given a reasonable meaning; and the construction of the clause as limiting the power of the legislature to determine the rule by which taxable property shall contribute, and as not limiting the power of that body to select the subjects of taxation, does give such words a reasonable meaning, and is the only construction that does do so. And if such is the meaning of the second clause, "but all property subject to taxation shall be taxed in proportion to its value," such is, necessarily, the meaning of the first clause, "there shall be no discrimination in taxing different kinds of property," for this first clause is modified and restrained by the meaning of the second clause. The two clauses are connected by the conjunction "but," which is defined by Webster as "More; further; noting an addition, to supply what is wanting, to elucidate or modify the sense of the preceding part of the sentence." Therefore, all that follows this word

relates, not to a *new* subject, but to what has gone before; and was intended to explain that which precedes. It is clear that the second clause could not elucidate the sense of the preceding clause unless it related to the *same thing* that such preceding clause related to. And since the second clause in the organic act related to the power of the legislature to determine the rule by which property subject to taxation should contribute, the first clause also relates to that power; and the power to select the subjects of taxation is unlimited.

This has been the constant construction placed upon this organic act by the various legislatures of Dakota. From the passage of the first revenue act, May 15, 1862, until the admission of the state in 1889, there has never been a period when the laws of Dakota did not exempt property from taxation.

Section 2 of the act approved May 15, 1862, provided:

"Sec. 2. The following described property is hereby exempt from taxation: 1. The property of the United States, and that of this territory; the property of any county, township, incorporated town, or school district, when devoted entirely to public use; public grounds, by whomsoever devoted to the public, including all places for the buriel of the dead. 2. Fire engines and implements used for extinguishing fires, with the grounds used exclusively for the buildings of a fire company. 3. All grounds and buildings of literary or scientific institutions, (incorporated) under the laws of this territory; also the grounds and buildings of benevolent, agricultural, and religious institutions, and societies devoted solely to the appropriate objects of these institutions, not exceeding six hundred and forty

acres in extent. 4. The books, papers and apparatus belonging to the above institutions, and used for the purpose above contemplated, and the like property of students in any such institutions; moneys and credits belonging to said institut ons, not exceeding in amount the sum prescribed in their charter. 5. Animals not specified in the next section; the wool shorn from the sheep belonging to the person giving the list; the provisions for any family, sufficient for the sustenance of the family for one year; private libraries, not exceeding one hundred dollars in value; family pictures; libraries of clergymen; household furniture, not exceeding two hundred dollars in value; the wearing apparel of every person. 6. The polls or estates or both of persons who, by reason of age or infirmity, may, in the judgment of the assessor, be unable to contribute to the public revenue. 7. The farming utensils of any person who makes his livelihood by farming; and the tools of any mechanic, not in either case to exceed one hundred dollars in value. 8. Government lands shall not be taxed for the year in which the entry, location, or purchase is made."

And see:

Sec. 3, Chap. 24, Laws of 1865-6.

Sec. 3, Chap. 23, Laws of 1866-7.

Sec. 1, Chap. 25, Laws of 1868-9.

Sec. 2, Chap. 28, Political Code of 1877.

Act approved March 9 1883. Chap. 99, Laws of 1883.

Sec. 1542, Compiled Laws of 1887.

This practical, uniform construction of the organic act by the legislatures called upon to act thereunder, is entitled to the greatest consideration. Under that construction property rights have grown up of the greatest importance. To reverse it now would be productive of the greatest financial disasters. Under such

circumstances only the clearest case of error will justify a court in refusing to follow where the legislature points the way. This rule has been repeatedly declared by the courts in the strongest language.

See:

Johnson v. *Joliet & Chicago R. R. Co.*, 23 Ill. 124, 129.

Brigham v. *Miller*, 17 Ohio 445, 447-8.

Rogers v. *Goodwin*, 2 Mass. 475.

Stuart v. *Laird*, 1 Cranch. 299, 309.

McCullough v. *Maryland*, 4 Wheat. 316, 401.

McPherson v. *Blacker*, 146 U. S. 1, 27.

People v. *Wright*, 6 Colo. 92.

State v. *Court*, 19 Ark. 360, 370-1.

N. P. R. R. Co. v. *Barnes*, (N. D.) 51 N. W. Rep. 386, 389.

Ferris v. *Vannier*, (N. D.) 42 N. W. Rep. 31, 39.

Kneeland v. *City of Milwaukee*, 15 Wis. 454, 468.

And the decisions of the supreme court of the territory fully uphold this view. At the expense of extending an already lengthy argument, I yet deem it advisable, for the convenience of the court, to quote from such decisions, as well as from a few of the decisions of other states having similar or more stringent constitutions.

Ferris v. *Vannier*, 42 N. W. Rep. 31, was an action brought to recover a tax paid under protest. Judge Thomas delivered an opinion hold-

ing the tax void because levied in one county for the sole benefit of another; and placed an interpretation upon the provisions of the organic act forbidding discrimination. In this portion of the opinion, however, the majority of the court did not concur, and as to this point the opinion of Judge Thomas must be considered a dissenting opinion. Chief Justice Tripp delivered the opinion of the majority of the court thereon. The learned justice says:

"What is meant by the clause prohibiting a 'discrimination in taxing the different kinds of property?' Does it mean, as claimed for it by the learned judge in the foregoing opinion, such a uniform system of taxation as that when any property within the taxing district is made subject to taxation all other property within the district must be equally so subject? Let us examine the section. It does not in terms require either a uniform rule or rate of taxation; it prohibits a discrimination. This word cannot have a literal rendering. All laws are open to the objection of discrimination, and sometimes even of unjust discrimination. Laws providing for levy and collection of taxes discriminate when property by intention or mistake escapes taxation. So also, in case of local assessment for sidewalks and municipal improvements; license taxes upon business; taxes upon dogs; errors in valuation, whereby property in one locality is assessed at a higher price or at a higher rate than in another, where personal property tax is made a lien upon real property; and some of them, perhaps, are an unjust discrimination, yet no one seems to think they avoid the taxes collected under such laws, or that the statute is open to the constitutional objection here raised. Taxation of property always requires the exercise of judgment and of a careful discrimination. Taxation of the different kinds of property without discrimination, (using the word in its popular sense), would lead to the very error, and produce the very mischief, congress has sought by this

provision to prevent. Discrimination cannot mean uniformity of taxation, for laws establishing a uniform rate or rule may unjustly discriminate in favor of or against other property of the same class. A law which taxes all farms at the same price, which fixes the value of every acre of land, every horse, every cow and every article of each class of personal property at the same sum for purposes of taxation, would be uniform; but who would not say at once that such a system was an unjust discrimination; yet, to correct such a wrong, the injured party must seek his redress from the legislature, and not from the courts. Says Judge Cooley in *Youngblood* v. *Sexton*, 32 Mich. 406, where it was objected that similar taxation was not uniform: 'The objection to a want of uniformity is wholly misplaced here. Uniformity is the very basis of this tax. It is levied entirely without discrimination; and the real objection to it is, not that it lacks uniformity, but that the legislature were unjust in making it uniform, instead of levying it by some standard of discrimination. The objection presents a case of misapplication of terms. It is also presented to the wrong tribunal.' To avoid such a uniformity congress has prohibited discrimination, which must be construed to mean unjust discrimination; a discrimination in favor of one kind of property as against another; a discrimination which prevents each kind of property subject to taxation from bearing its fair and equal share of the burden imposed upon all. In this sense the words are aptly chosen; in any other they are meaningless, and lead to absurd results. Under this construction we are free from many of the perplexities in which courts have found themselves in determining whether laws which were not discriminating were uniform. The disjunctive clause with which this provision is connected further limits and explains it; standing alone it might be construed to mean that all property of every kind must be taxed equally, without discrimination; but the words 'subject to taxation' limiting the words and clause of which they form a part, extend their limiting power to the principal clause, which the disjunctive clause itself limits, so that the meaning of both construed together, is that there shall be no unjust discrimin-

ation in the taxation of the different kinds of property subject to taxation, but all such property shall be taxed in proportion to its value. These words, 'subject to taxation,' are of importance in the construction of this section; without them, all property would be subject to taxation; with them, only certain property is liable to taxation.

Who is to determine what property is 'subject to taxation?' The courts cannot determine. It is a legislative function. It can only be exercised by the legislature or by congress. Congress has not seen fit to exercise it, but has given to the legislature the absolute control over 'all rightful subjects of legislation,' saving and reserving to itself alone the right to modify or annul the same. This certainly is a rightful subject of legislation, and it follows that congress has given to the legislature the right to apportion and subject property to taxation. The legislature, then, has a right to say what property shall be subject, and what shall not be 'subject to taxation;' what property shall be taxed, and what property shall be exempt from taxation,—limited only by the provision that all property so subject to taxation shall be taxed without unjust 'discrimination' in favor of one kind of property as against another, so that every kind of such property shall be taxed in proportion to its value." p. 37.

In the case of *N. P. R. R. Co.* v. *Barnes*, 51 N. W. Rep. 386, the same court says:

"We do not think that section 6, which is the only provision of the organic act relied on by respondent, has any bearing on the case. The language is that 'there shall be no discrimination in taxing different kinds of property, but all property subject to taxation shall be taxed in proportion to its value.' This provision undoubtedly imposed a limitation upon the taxing power of the territorial legislature, but not of the kind contended for. In the apportionment of every tax it is requisite not only that the subjects to be taxed shall be selected, but also that the rule by which they shall contribute shall be determined. The territorial legislature had the power to determine both of these

questions, except in so far as section 6 limited that power. It certainly cannot be doubted that the section did not limit the legislative power in respect of selecting the subjects of taxation. If it did, then it would have prevented the legislature from making any exceptions from taxation whatsoever, and have made it incumbent upon that body to tax all property in the territory which from its nature or character was susceptible of taxation. But it has never seriously been doubted that the legislature had the power to make such exemptions from taxation as it saw fit. The power has certainly been exercised, without question or objection, ever since the organization of the territory. Every revenue law has contained provisions exempting certain kinds and species of property, and it would be with great reluctance, and only upon the most cogent reasons, that this court would, at this late day, cast doubts upon the validity of the exercise of a power that has so long been supposed to exist, and that has been exercised for more than thirty years without question or objection. p. 389."

Section 1 of article 10 of the constitution of Virginia provides:

"Taxation, except as hereinafter provided, whether imposed by the state, county or corporate bodies, shall be equal and uniform, and all property, both real and personal, shall be taxed in proportion to its value, to be ascertained as prescribed by law. No one species of property from which a tax may be collected, shall be taxed higher than any other species of property of equal value."

The third section of the same article provides:

"The legislature may exempt all property used exclusively for state, county, municipal, benevolent and charitable purposes."

That these provisions are more stringent than those contained in the organic act of Dakota, is beyond question. In *Williamson* v. *Massey*,

33 Gratt. 237, it is held that they do not forbid the exemption of property other than that enumerated in section 3. Judge Anderson delivered the opininion for the court. After holding that "the power of exemption, as well as the power of taxation, is one of the essential elements of sovereignty," the learned judge says:

"Is it forbidden by the above clause in the Virginia constitution? * * * It was not intended to require the legislature to tax all the property in the state, and forbid its exercising its inherent power, when necessary for the public interest, and promotive of a sound public policy, to exempt certain property from taxation, but only to prescribe a rule by which the legislature should be guided, in apportioning taxation, that all property taxed should be taxed in proportion to its value. That it does not mean to take from the legislature its important inherent power of exercising a discretion, when in its wisdom it may be deemed beneficial to the public, of exempting certain property from taxation, is more apparent when read in connection with the first clause in the sentence, which declares that taxation 'shall be equal and uniform'; and then follows the clause in question, separated from it only by a comma, 'and all property,' not only personal property, or only real property, but all property 'both real and personal, shall be taxed in proportion to its value, to be ascertained as prescribed by law. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value.'

"Giving to the language of this section its proper signification, and to each member of the sentence, and to each sentence, their just influence and bearing in conveying the meaning of the whole, it was the intention to require that taxation should be on the *ad valorem* principle, and that it should be equal and uniform; and it was no purpose of the framers of the constitution, by this section, (section 1) to restrict

the legislature in the selection of the subjects of taxation, or to divest it of an important element of sovereignty, by an inflexible inhibition of exempting, in any case, property from taxation. The same rule of taxation prescribed for the state, is by this section prescribed for the county or corporate bodies. City councils, for the promotion of the growth and welfare of the city, regard it as important to introduce certain manufacturing, or other industrial enterprises, within the limits of the city, and to encourage their introduction, stipulate on behalf of the city, that the property of those who engage in the enterprise within the limits of the city shall not be liable to taxation for a series of years. Would such an exemption, whilst it tends to increase the sources of revenue to the state, and to build up our cities, and to advance the prosperity of the rural districts by furnishing them marts for the productions of the soil, be forbidden by the constitution? * * *

"Nor is it taken away or forbidden by section 3 of the same article of the constitution. That article does not forbid, but authorizes exemptions by the legislature in certain specified cases, without forbidding it in others. The language is 'The legislature may exempt all property used exclusively for state, county, municipal, benevolent and charitable purposes.' If it had intended to forbid its exempting other property, it would have been easy to add the words, 'but no other;' and we think if its purpose had been to deprive the legislature of a power, the exercise of which in cases that might arise, might be so beneficial to the state, and the inhibition of which might be so hurtful, the above words, or their equivalent, would have been added." p. 241.

The constitution of Mississippi provides as follows:

"ARTICLE XII.

"Section 13. The property of all corporations for pecuniary profits shall be subject to taxation, the same as that of individuals.

"Section 20. Taxation shall be equal and uniform throughout the state. All property shall be taxed in proportion to its value, to be ascertained as directed by law."

These provisions are stronger than the organic act, because they make *all* property taxable according to value. And yet it has been held that they do not prohibit exemptions. In *Mississippi Millls* v. *Cook*, 56 Miss. 40, the validity of a statute was contested which exempted from taxation all factories "for the manufacture of cotton and woolen goods, or yarns, or fabrics composed of those or other materials, etc." The statute was sustained, Campbell, J., saying:

"The true view is that this provision of the constitution fixes, beyond legislative act, the condition of the property of all corporations for pecuniary profit as being always liable to the exercise of the taxing power, so as to subject it, at the will of the legislature, to the same taxation as the property of individuals may be subjected to. The legislature may exempt property of a certain class, whether the owners be corporations or natural persons, but corporate property shall never be placed beyond the reach of the taxing power. It may not be taxed, but it must be ever liable. It need not be '*subjected*' but it must always be '*subject*' to taxation, the same as that of individuals, for the constitution so declares. The provision is *mandatory* as to universal liability to be taxed, but *permissive* to the legislature to tax the property of such corporations, or exempt it, as it may see proper, in common with the property of individuals, which may be taxed, or not, for the time being * * * The words 'all property shall be taxed in proportion to its value' do not require that all property shall be taxed, and deny to the legislature the right to exempt any. The purpose of their employ-

ment is to fix the rule for the taxation of property. Before the adoption of the present constitution, the power and the practice existed to tax property without regard to value. The intent of this provision was to protect against the taxation of property except in proportion to its value, to be ascertained as directed by law. The *ad valorem* rule in taxing property is secured, and the ascertainment of this value, as directed by law, is made necessary, so that the proportion to its value may be borne in the matter of taxation of property. If the purpose had beeen to prohib it exemption from taxation, it would have been declared in unmistakable terms. It was easy to declare that the legislature shall not exempt any property from taxation. The omission of such a provision makes it certain that no such prohibition was thought of." p. 54.

Simrall, C. J., said:

"The injunction to the legislature is, that when it undertakes to tax property, and has selected the subjects on which the burden shall be imposed, it must be laid on a valuation, and not on the acreage, for instance, and the percentum of the tax must be the same in all localities, and must be uniform; that is, all persons, owners of the same sort of property, must bear equally the burdens. The section does not necessarily require that all property in the state at the time of the assessment must be taxed. It does not take away from the legislature the discretion to select the subjects. But when the selection is made, all property of that sort must bear its proportional part of the burden." p. 60.

The constitution of Missouri of 1820, by section 19 of article XIII. provided:

"That all property, subject to taxation in this state, shall be taxed in proportion to its value."

In *Hamilton* v. *St. Louis County Court*, 15 Mo. 3, the court, construing this section, say:

"When the 19th section of the Declaration of Rights is invoked, to protect the county against this act, it is necessary to inquire into the meaning of the declaration 'that all property, subject to taxation in this state, shall be taxed in proportion to its value.' The clause is evidently mandatory upon the general assembly, when exercising the taxing power, and furnishes a rule which is not to be departed from. What property shall be subjected to taxation is left to their discretion, but when they have selected the subjects, the rule for assessing the tax, is, in proportion to the value of the property." p. 24.

See also:

State v. *North*, 27 Mo. 465.

Crow v. *State*, 14 Mo. 323.

The constitution of Arkansas provided that:

"All property *subject to taxation*, shall be taxed according to its value—that value to be ascertained in such manner as the general assembly shall direct; making the same equal and uniform throughout the state. No one species of property, from which a tax may be collected, shall be taxed higher than another species of property of equal value."

Const. Ark. Art. VII. Title Revenue, sec. 2.

In the case of *State* v. *County Court of Crittenden County*, 19 Ark. 360, the court held that the exemption from taxation of swamp lands sold by the state, was constitutional. After examining the case of *Pike* v. *State*, 5 Ark. 205, and overruling the same so far as it sought to lay down a contrary doctrine, the court says:

"We declare the true rule of construction to be, that the legislature has the power, under the constitution, to select the objects of taxation, and upon the exercise of this power there is no constitutional restriction. When the legislature has selected the objects, then restrictions attach as to the imposition of

taxes upon them; and the end intended to be accomplished, is equality and uniformity in the taxation of all the property *taxed*, throughout the state, and not equality and uniformity throughout the state, as to the *whole* of each, or any particular species of property from which objects of taxation may have been selected. The restrictions relate to the valuation of the property taxed, and to the rate of taxation imposed. They require all the property selected for taxation to be taxed according to its value, and that the *rate* of taxation imposed; shall not be fixed higher upon the property of one tax payer than upon that of another, no matter whether the property be of the same, or of different species; and when this equality in valuation and rate, has been observed, it necessarily follows that the taxation of the property *taxed* is equal and uniform." p. 370.

The constitution of Illinois provides that:

"The general assembly shall provide for levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his or her property, such value to be ascertained by some person or persons to be elected or appointed in such manner as the general assembly shall direct." Sec. 2, Art. 9, Const. of 1848.

The charter of the Illinois Central Railway Company provided that the payment into the state treasury of five *per centum* of its gross earnings, by the company, should be in lieu of all taxes for the period of six years. In *Illinois Central R. R. Co.* v. *McLean*, 17 Ill. 291, this exemption was held to be valid. It will be observed that the provisions of the Illinois constitution and of section 6 are substantially alike, the only difference being a verbal one. The former provides that the property of *every person and corporation* shall be taxed according

to value and as *all* property must necessarily be owned by persons or corporations, it is tantamount to saying that all *property* shall be taxed according to value.

The constitution of New Jersey provided that:

"Property shall be assessed for taxes under general laws and by uniform rules, according to its true value."

In *Stratton* v. *Collins*, 43 N. J. L. 562, it was held that:

"It is plain that this provision does not require all property to be taxed. It leaves the legislative power of selecting the subjects of taxation as untrammeled as it ever was." p. 564.

See also:

Opinion of Judges in *State Board* v. *State*, 24 Am. and Eng. R. R. Cases 546.

Section 11 of article XIV. of the constitution of Michigan provides that:

"The legislature shall provide a uniform rule of taxation, except on property paying specific taxes; and taxes shall be levied on such property as shall be prescribed by law."

In *People* v. *Auditor General*, 7 Mich. 84, the supreme court of Michigan, construing an act exempting from taxation lands granted to aid in the construction of a canal, held that such exemption did not violate the provisions of the constitution. They say:

"I do not regard this remission of the taxes as a violation of that provision of article XIV of the con-

stitution which requires the legislature to provide a uniform rule of taxation, except on property paying specific taxes. This provision of the constitution has no reference to the power to exempt, or to remit taxes; which is, and necessarily must be, to a great extent, left to the discretion of the legislature. Its design was to secure, to every portion of the state, and to every class of property taxed, a uniform rate—to secure equality, so that property in one quarter should not be taxed at a higher rate than in another, or the same kind taxed unequally. The legislature has the power of prescribing the subjects of taxation, and of exemption, but it cannot arbitrarily tax property according to locality, kind, or quality, without regard to value (Sedg. on Stat. 557); but in this respect it must act by uniform rules. But to exempt property, as is done in the case of church, school, or library property, or to remit taxes for any cause, has nothing to do with the uniformity of the rule of taxation." p. 89.

See also:

Board of Supervisors v. *Auditor General*, 65 Mich. 408.

Article 127 of the constitution of 1845 of Louisiana provides:

"Taxation shall be equal and uniform throughout the state. After the year 1848, all property on which taxes may be levied in this state shall be taxed in proportion to its value, to be ascertained as directed by law. No one species of property shall be taxed higher than another species of property of equal value on which taxes shall be levied."

The resemblance between this and the Dakota organic act is apparent. The supreme court of Louisiana, speaking of this article, says:

"To be uniform, taxation need not be universal. Certain objects may be made its subject and others may be exempted from its operation, certain occupa-

tions may be taxed and others not; so some occupations may be taxed for a greater amount and others for a less, but as between the subjects of taxation in the same class, there must be an equality."

State v. *Poydras*, 9 La. An. 165, 167.

The constitution of Louisiana was modified in 1868 to read:

"Taxation shall be equal and uniform throughout the state. All property shall be taxed in proportion to its value, to be ascertained as directed by law. The general assembly shall have power to exempt from taxation property actually used for church, school, or charitable purposes." Article 118.

It was objected by the defendant that under this constitution an exemption of "household goods, and mechanics' and laborers' tools to the amount of $500," etc., was unconstitutional. The court says:

"We do not construe that clause as does the defendant. It simply means that the taxation of all property subject to tax shall be *ad valorem*. That specific taxes shall not be levied on property."

City of New Orleans v. *Fourchy*, 30 La. An. 910, 913.

City of New Orleans v. *Davidson*, 30 La. An. 554.

Article 2, section 28, constitution of Tennessee, 1834, provides:

"All lands liable to taxation, held by deed, grant or entry, town lots, bank stock * * * and such other property as the legislature may from time to time deem expedient, shall be taxable. All property shall be taxed according to its value; that value to be ascertained in such manner as the legislature shall direct, so that the same shall be equal and uniform

throughout the state. No one species of property from which a tax may be collected sha l be taxed higher than any other species of equal value."

The supreme court of that state speaking of this provition, says:

"In this language can be found no imperative requirement that all property shall be taxed. Under it the legislature might tax or omit to tax. The direction is that certain property, named in the first sentence, and such other property as the legislature may deem expedient, 'shall be taxable.' The matter of taxation, not only as to the amount to be levied, but as to the property upon which to be levied, was left largely to the legislative discretion. Therefore the provision was not violated by grants of immunities from taxation under the other provision."

State v. *Memphis City Bank*, 19 S. W. Rep. 1045, 1048.

The organic act of Washington territory provided:

"All taxes shall be equal and uniform, and no distinction shall be made in the assessments between different kinds of property, but the assessments shall be according to the value of the property."

Rev. Stat. §1924.

It is held that this provision does not forbid exemptions. See exhibit "A."

It was provided in the constitution of California that:

"Taxation shall be equal and uniform throughout the state. All property in this state shall be taxed in proportion to its value, to be ascertained as directed by law."

This provision is very different from the provision in the organic act of Dakota. The words

"subject to taxation" are omitted; and the decisions of the supreme court of California, holding that under this provision all property must be taxed, can be considered as authority in construing the organic act of Dakota only as far as the reasoning therein contained may be applicable. In the case of *People* v. *Coleman*, 4 Cal. 46, and *High* v. *Shoemaker*, 22 Cal. 363, the supreme court held that the words "equal and uniform" applied only to the direct taxes on property; and that the power of the legislature to exempt property from taxation was unimpaired.

In the case of *People* v. *McCreery*, 34 Cal. 432, the court reversed this position and held that this provision required the taxation of all property and forbade the legislature exempting any property whatsoever. Their reasoning, however, upon the language of their statute, supports our contention as to the meaning of the organic act of Dakota. On page 450 the court says:

"The constitution of Missouri provides 'that all property subject to taxation in this state shall be taxed in proportion to its value.' In construing the language of this section, the question at once presents itself as to the word 'subject,' whether the property to be taxed was all the property within the state, over which the government of the state had jurisdiction, or only such property as the legislature might in its discretion subject to taxation.

"These questions were very elaborately discussed in *Crow et al* v. *The State of Missouri*, 14 Mo. 237, and a majority of the court were of the opinion that the first was the meaning of the term. *This*

matter is alluded to here merely to say, that in the section of our constitution, there is no such word of doubtful import."

This word of doubtful import, to which so much importance is given, is found in the organic act of Dakota. Continuing, the court says:

"The section relating to taxation in our constitution was taken, with certain important modifications, from that of Texas. The twenty-seventh section of article VII. of Texas is as follows: 'Taxation shall be equal and uniform throughout the state. All property in this state shall be taxed in proportion to its value, to be ascertained as directed by law, except such property, as two-thirds of both houses of the legislature may think proper to exempt from taxation. The legislature shall have power to levy an income tax and to tax all persons pursuing any occupation, trade or profession: provided that the term 'occupation' shall not be construed to apply to pursuits either agricultural or mechanical.' * * * Accepting as a fact that our constitutional convention borrowed the first portion of the section relating to taxation from the constitution of Texas, and seeing that the clause in that constitution permitting the legislature to exempt property from taxation, is omitted from our constitution, the conclusion is inevitable that it was not intended that the legislature should possess the power to exempt property from taxation, if the previous clauses of that constitution did, in fact, limit the power of the legislature in that respect." p. 451.

This reasoning, which appears to have carried such great weight in the construction of the constitution of California, has no application to, and cannot be employed in construing the organic act of Dakota; nor is the reasoning of the court altogether satisfactory. The supreme court of Mississippi, in *Mississippi Mills* v.

Cook, 56 Miss. 40, 58, referring to the earlier decisions in *People* v. *Coleman*, 4 Cal. 46, and in *High* v. *Shoemaker*, 22 Cal. 363, said, with reference to the decision in *People* v. *McCreery*, "We consider the view held in the earlier cases * * * the sounder one."

We think it too clear for dispute, both in the light of reason and authority, that section 6 of the organic act of Dakota does not impose any limitations upon the power of the legislature to make such exemptions from taxation as it may see fit. It has the power to select whatever property it chooses, and as soon as it does this, the limitations prescribed in the act become operative upon the property which by selection has become subject to taxation.

This view, as to the construction of the 6th section is not controverted or denied, by counsel for appellees. The learned counsel for appellees in their brief filed at the former argument of this cause (then entitled *N. P. R. R. Co.* v. *Walker et al.*,) in this court say:

"We admit that the organic act does not prohibit exemptions from taxation." p. 30.

And this right to exempt was not denied by the circuit court in its opinion in this case. 47 Fed Rep. 681. And in continuing this argument, I shall assume that this power to exempt is fully vested in the legislature.

It is insisted, however, both by the appellees and in the opinion of the circuit court, that the power to exempt property from taxa-

tion is limited by the organic act to the right to classify property for the purposes of taxation; and that while the power exists either to exempt or tax in such manner as the legislature may choose, subject to the requirement that the tax shall be an *ad valorem* tax, all the members of a class must be treated precisely alike; and that no discrimination can be made between the members of a class. It is further insisted that while the legislature might have the power to classify railroads together for the purposes of taxation, and perhaps exempt them entirely from taxation, or commute the taxes as is sought to be done by the gross earnings law, yet that that classification of railroads must be restricted to what is defined by the court as "railroad property" as distinguished from "property of a railroad company"; and that lands held by the company by virtue of a grant cannot be included in such a classification, but must be included within a classification of lands, if any there be, according to their use, character and condition, and not because of their ownership.

This argument is the same as that insisted upon in connection with Question V., and what is there stated in reply thereto, is equally applicable here.

In addition thereto, I urge the following propositions:

2.

THE ORGANIC ACT DOES NOT FORBID EXEMPTIONS; AND UNLESS BY REASON OF THE EXEMPTIONS THE TAX LEVIED UPON OTHERS UNJUSTLY DISCRIMINATES AGAINST THEM, IMPAIRING THEIR RIGHTS OF PRIVATE PROPERTY, THERE IS NO CONFLICT WITH THE ORGANIC ACT. AN EXEMPTION RESTING IN CONTRACT AND GIVEN IN LIEU OF A VALUABLE CONSIDERATION, CANNOT BE HELD TO CREATE AN UNJUST DISCRIMINATION.

As the clauses in section 6 of the organic act, "nor shall any discrimination be made in taxing different kinds of property; but all property subject to taxation shall be taxed in proportion to its value," do not in any manner restrict the power of the legislature to select the subjects of taxation, no exemption is in conflict with these provisions of the organic act. And unless the exemptions infringe some other provision of the organic act, they are not void because in conflict with that instrument. The only other provision suggested is the one: "Nor shall any law be passed impairing the rights of private property." Subject to the condition that the exemptions shall not be such as to render the purported tax an arbitrary exaction, necessarily impairing the rights of private property, such exemptions cannot be objected to as in conflict with the organic act, however unwise or unjust the court may consider them.

In *Lane* v. *Oregon*, 7 Wall. 71, this court says of the taxing power:

"The extent to which it shall be exercised, the subjects upon which it shall be exercised, and the mode in which it shall be exercised, are all equally within the discretion of the legislatures to which the states commit the exercise of the power. That discretion is restrained only by the will of the people expressed in the state constitutions or through elections, and by the condition that it must not be so used as to burden or embarrass the operations of the national government." p. 77.

In *People* v. *Brooklyn*, 4 N. Y. 419, the court referring to the decision in *People* v. *Brooklyn*, 6 Barb. 209, where it had been held that a tax to be valid must be apportioned upon principles of just equality, and upon all the property in the same political district, and that this is a fundamental principle of free government, which, although not contained in the constitution, limits and controls the power of the legislature, say:

"This is new, and seems to me to be a dangerous doctrine. It clothes the judicial tribunals with the power of trying the validity of a tax by a test neither prescribed nor defined by the constitution. If by this test we may condemn an assessment apportioned according to the relation between burden and benefit, we may, with a far better reason, condemn a capitation tax, on the ground that numerical equality is not just equality; or a general property tax for a local object, because it compels one portion of the community to pay more than their just share for the benefit of another portion. All discriminations in the taxation of property, and all exemptions from taxation on the ground of public policy, would fall by the application of this test. If this doctrine prevails, it places the

power of the courts above that of the legislature in a matter affecting not only the vital interests, but the very existence of the government. It assumes that the apportionment of taxation is to be regulated by judicial and not by legislative discretion. It obstructs the exercise of powers whish belong to and are inherent in the legislative department, and restrains the action of that branch of the government in cases in which the constitution has left it free to act." p. 429.

See also:

Crawford v. *Linn Co.*, 11 Or. 482, 485.

Ill. Cent. R. R. Co. v. *Decatur*, 147 U. S. 190, 203.

Sharpless v. *Mayor of Philadelphia*, 21 Pa. St. 147, 160.

Kirby v. *Shaw*, 19 Pa. St. 258, 260.

Williams v. *Cammack*, 27 Miss. 209, 219.

Thomas v. *Leland*, 24 Wend. 65, 69.

Veazie Bank v. *Fenno*, 8 Wall. 533, 548.

U. P. R. R. Co. v. *Penniston*, 18 Wall. 5, 29.

These authorities conclusively establish that it is not sufficient to render a tax unconstitutional, that it operates unjustly or discriminates. If the constitution does not forbid such unjust discrimination in terms, or by necessary implication, it is not in the domain of the judiciary to seek to cure the evil by declaring the law unconstitutional because unjust. The court cannot set up a standard of what, in its opinion, is equitable and right, and by that determine the constitutionality of tax legislation; those laws must be measured by the written constitution; and if there is no necessary conflict between that written constitution and the

provisions of the act, the law must be sustained.

Cooley's Const. Limitations, secs. 201, 202, 203, 205, 206, (5th ed.)

The only question, therefore, remaining to be considered in determining whether the "gross earnings law" is in conflict with the organic act, is whether the exemption of the lands thereby made is such as to render a tax upon property, including lands other than those owned by the railroad companies, a confiscation of such property rather than a tax; making it violate the provisions that no law shall be passed impairing the rights of private property. This question is substantially the same question presented by the alleged conflict with the XIVth amendment, and what is there urged is equally applicable here, while what is here said should be considered in connection with that argument. The "gross earnings law" does not make a pure exemption of property of railroad companies from taxation, without consideration. Such property is not taxed directly under that law, but in lieu of such direct tax, an equivalent is taken, based upon the grosss earnings.

"This is not an immunity from taxation, but a commutation of taxes—another and substituted way prescribed by law, in which the respondent, as owner of this land, among other property, is to contribute its share to the public revenue."

Hennepin Co. v. *St. P. M. & M. R. R. Co.*, 33 Minn. 524, 535.

State Bank v. *People*, 4 Scam. 303.
Hunsaker v. *Wright*, 30 Ill. 146.

"Where a certain sum is specified, or a certain percentage upon valuation, or upon receipts or acquisitions in any form, this is in the nature of a commutation of taxes, the state agreeing that the sum named is, under the circumstances, a fair equivalent for what the customary taxes would be, or the fair proportion which the person bargained with ought to pay, and the power thus to commute, although liable to abuse, is undoubted."

Cooley on Taxation 69, (2d ed.)

The supreme court of Kentucky, speaking on this subject, says:

"The appellant's first contention is that the legislature had no constitutional power to exempt the appellee from the common burden of taxation, except 'in consideration of public services.' It contends that the exemption of the appellee from all taxation, except 50 cents on $100 of its capital stock, was not 'in consideration of public services,' and therefore void. * * * * But the right of the state to grant the charter to the appellee, and exempt it from the payment of all taxes, except 50 cents on each share of its capital stock, rests upon the power of the state to make for a valuable consideration, a valid and irrevocable contract. The state of Kentucky, in the management and control of her affairs, in her relation to other states, in her relation to the Federal government, except in so far as certain powers are delegated by the constitution of the United States to the Federal government, or are denied to the states, is sovereign by right. It is by virtue of her sovereignty that she has the power to contract. No binding contract can be entered into except by virtue of sovereign power. It is by this power that the state makes contracts with individuals, that she borrows money and gives her obligation for its payment. To deny a state the power to make binding contracts is a denial of its power as a sovereign. Possessing the sovereign power

to contract, she exercises the right just as an individual exercises his. The individual, in exercising the right of contract, does not barter away his sovereignty. He, for a valuable consideration, simply exercises it. For a valvuable consideration, coming to him from the other party to the contract, he surrenders something, and receives something in its stead which he deems an equivalent. Whether the one or the other has in fact received an intrinsic equivalent for that with which he has parted is not the question. The fact that it is of more or less value, and deemed by him to be an equivalent, is all that is required to make the contract irrevocably binding. In thus contracting, he does not surrender his sovereign power; he merely exercises it. Upon precisely the same principle the commonwealth contracts. If her contract is without any valuable consideration, it is a *nudum pactum;* so is that of the citizen. But if there is a valuable consideration to support it, she is bound by it, not upon the idea that she has surrendered or bartered away her sovereignty, but that she has exercised it in accordance with what she deems to be for the best interests of her citizens. The state possessing the power to make, for a valuable consideration, a binding contract, she falls within that provision of the Federal constitution that declares that she shall pass no law impairing its obligation. In respect to her contracts, she stands upon precisely the same footing that she does in reference to the contracts made between individuals—she shall pass no law impairing their obligation. In accordance with the foregoing views, the supreme court of the United States, ever since the *Dartmouth College Case*, 4 Wheat. 518, have consistently held that the creation of a corporation, especially banks, by the legislature of a state, whereby it was agreed that the corporation, in consideration of paying to the state a specific tax or bonus, was to be released from the payment of all of her taxes, constituted a binding contract, from which the state could not recede without the consent of the corporation; unless the state, in making the contract, expressly reserved the power to alter or amend it; or unless there was a general law in force

at the time of making the contract, which authorized the state, by subsequent legislation, to alter or amend it, and that there was nothing appearing in the legislative act of the contracting parties showing that the general law should not govern it. *Bank* v. *Knoop*, 16 How. 369; *New Jersey* v. *Yard*, 95 U. S. 104; and *Farrington* v. *Tennessee*, Id. 679. This doctrine is so firmly rooted by the decisions of the supreme court of the United States, and so uniformly recognized by the courts of last resort of all the states, that a decision by us holding the contrary would be regarded as eminently sporadic."

Franklin Co. v. *Deposit Bank*, 9 S. W. Rep. 212, 213.

And see:

State Bank v. *Knoop*, 16 How. 369, 383, *et seq.*

Lackawanna Co. v. *Banty*, 94 Penn. St. 221.

Hunsaker v. *Wright*, 30 Ill. 146.

State Bank v. *People*, 4 Scam. 303.

Ill. Cent. R. R. Co. v. *McLean*, 17 Ill. 291.

Ill. Cent. R. R. Co. v. *Goodwin*, 94 Ill. 262.

If the consideration given for the exemption is, in fact, equivalent to the tax on the property exempted, there is no discrimination in the burden laid upon the different tax payers; each contributes his share; the results are the same, although arrived at in a different manner. Such an exemption would not deprive the tax payers of the equal protection of the law, or impair the rights of private property. *And where the legislature has passed an act granting an exemption for certain considerations, or, in other words, has commuted a tax, it is a conclusive presumption of law that the considerations received in lieu of*

such exemption are the exact equivalent thereof. The courts cannot inquire into this question for the purpose of determining whether the act be constitutional or not. This is obvious. The question of the sufficiency of the consideration is one for the legislature; and when it tenders the contract in the form of a law, it is conclusively presumed to have determined that question for itself. The courts are not appointed the guardians of the legislature to see that it is not cheated in its bargains. Were it in the power of the courts to look into the sufficiency of the consideration, and by that test determine whether the act discriminates unjustly, the constitutionality of any act like the "gross earnings law" would forever remain unknown, varying in different counties and from year to year. In counties off the line of the road, where the company's land holdings were large, the "gross earnings tax" might easily fall below what would be collected by a direct tax on the lands. In other counties where the land holdings were small, the "gross earnings tax" would probably be the larger. Is the law unconstitutional in one county and not in the other? Or, the amount of the "gross earnings tax" necessarily varies as the annual earnings increase or diminish. Is the law constitutional one year and not another, as the percentage of the earnings equals or falls below what would be the amount of the direct tax? Again, the benefit to the public by the

encouragement of the enterprise may be an element moving the legislature in granting the exemptions. Is the constitutionality of the act to depend upon the value which the particular judge before whom the question may arise, may assign to that public benefit? We must either answer these questions in the affirmative and assume all the absurd results necessarily arising, or concede that the determination of the legislature, as evidenced by the law, that the consideration given for the exemption is the equivalent of the tax, is conclusive.

In *State Bank* v. *Knoop*, 16 How. 369, the supreme court, speaking of a commuted tax, say:

"Whether the consideration paid by the banks was large or small, we suppose was not a matter for the court, as the motives or consideration which induced a sovereign state to make a contract, cannot be inquired into as affecting the validity of this act." p. 387.

Speaking of an exemption of a land grant from taxation while the land remained in the hands of the original grantee, a railroad company, (the constitutionality of which exemption was sustained) the supreme court of Michigan say:

"It is not the duty of courts to inquire into the consideration of legislative grants or exemptions * * * If the legislature regarded a temporary exemption from taxes as likely to be a profitable measure for the future financial interests of the state and county, it

was for them, and not for us to say whether the case warranted it."

Board of Supervisors v. *Auditor General*, 65 Mich. 408, 411-2.

s. c. 32 N. W. Rep. 651.

And see:

Cooley on Taxation. 214. (2nd ed.)

M. & St. P. R. R. Co. v. *Supervisors*, 29 Wis. 116, 123.

First Div. St. P. & P. R. R. Co. v. *Parcher*, 14 Minn. 224, 251, (Gilf. ed.)

Carondelet Canal Co. v. *City of New Orleans*, (La.) 10 So. Rep. 871.

If the sufficiency of the consideration which moved the legislature to enter into a contract exempting property from taxation were subject to review by the courts, stability would be a thing unknown to the law. Judges would constantly differ in their opinions thereon, and as their opinions honestly varied, so would they hold the law constitutional or unconstitutional. The question is, therefore, wisely removed from their domain.

And where the legislature has, for a valuable consideration, granted an exemption, no question can be made as to whether the commuted tax discriminates; and no charge of unconstitutionality can be founded on that ground. The "gross earnings law" of Dakota is such a law. Whether the railroad company would, under its operation, escape any portion of its just share of the burdens of taxation, depends entirely

upon varying facts: the amount of the earnings in any year, the amount of taxable property owned, etc. It by no means *necessarily* results in a discrimination against other tax payers.

Before passing from the question of discrimination, another answer to such objection should be noted. The right to tax all lands is conceded. So is the right to classify all lands together and exempt them from taxation. In neither case will it be claimed that there is an unjust discrimination, for all of the class are treated alike. By legislation antedating the "gross earnings law" all lands were subjected to taxation. By the "gross earnings law" all lands granted to and owned by railroad companies are exempted. Now, if there be no constitutional inhibition against discrimination, the two statutes may stand side by side. Conceding *pro arguendo* appellees' position as to the organic act prohibiting such discrimination, to be correct, the two acts cannot stand. *But which must fall?*

The objection does not arise because either directly violates the organic act, for the act exempting lands is as valid as the act taxing lands, if only all other lands be treated in the same manner. I think it clear that the question presented is not a question of constitutionality; or we have the anomalous proposition presented of an act unconstitutional, not because it conflicts with the constitution, but because it conflicts with another act. I have long

been taught that such a case presented simply a question of repeal of a statute; and that where the earlier act could not stand with the later, the earlier was repealed by implication, even though the later act contained no express words of repeal. And in this case if it be within the power of the legislature to exempt all lands from taxation, the attempt to exempt a part is not unconstitutional. If thereby unjust discrimination is caused, the remedy is for the parties injured by the discrimination to resist and enjoin attempts to collect the taxes from them; not for the taxing officers to disregard the later law and seek to assess that which the law says shall not be assessed.

3.

THE TERRITORY OF DAKOTA COULD AID IN THE CONSTRUCTION AND MAINTENANCE OF AN ENTERPRISE OF GENERAL PUBLIC BENEFIT, SUCH AS RAILROADS, EITHER BY EXEMPTION FROM TAXATION OR OTHERWISE, AND SUCH ASSISTANCE WOULD CONFLICT WITH NEITHER THE XIVTH AMENDMENT NOR THE ORGANIC ACT.

It is settled that a railroad is a work of *quasi* public character. Upon this proposition is based the right to exercise the power of eminent domain. Land taken for a right of way is taken for a public use. And the building of a railroad is an act done for the public use. And be-

cause railways are of such character, it is within the power of the legislature to lay taxes to aid in the construction and maintenance thereof, unless expressly forbidden by the constitution. Such taxes are taxes levied for the public benefit. Says the supreme court:

"That the legislature of the state might have granted aid directly to any railroad company by actual donation of money from its treasury, will not be controverted. No one questions that in the absence of some constitutional inhibition the power of a state to appropriate its money, however raised, is limited only by the sense of justice and by the sound discretion of its legislature. If the power to tax be unrestricted, the power to appropriate the taxes is necessarily equally so. Accordingly nothing has been more common in the state and federal governments than appropriations of public money raised by taxation to objects, in regard to which no legal liability has existed. State legislatures have made donations for numerous purposes, wherever, in their judgment, the public well-being required them, and the right to make such gifts has never been seriously questioned. As has been said, the security against abuse of power by a legislature in this direction is found in the wisdom and sense of propriety of its members, and in their responsibility to their constituents."

Railroad Company v. *County of Otoe*, 16 Wall. 667, 675.

Olcott v. *Supervisors*, 16 Wall. 678.

N. P. R. R. Co. v. *Roberts*, 42 Fed. Rep. 734, and cases cited.

It was in the power of the legislature of Dakota in 1889 to donate to every railroad company, or to any particular railroad company, a sum equal to the exact taxes assessed against that company. It could have levied additional

taxes upon the people for the purpose of making such donations. Its action in this respect would have been in conflict with neither the XIVth Amendment nor the organic act. But can it reasonably be claimed that, while the legislature could thus indirectly relieve railroad companies or any specific railroad company, it could not directly give them the same relief by an exemption from taxation, or a commutation of the tax? That it could not do directly what it could do indirectly? The question answers itself. The right of the state on grounds of public policy to encourage or favor an industry or enterprise in which the public at large has an interest, by exemptions of the property of the corporation chartered therefor, from taxation, as well as by donations, is settled. Judge Cooley in enumerating the grounds upon which an exemption may justly be placed, among others, says:

"Or it ought to be made on some ground of public policy, such as might justify a pension or a donation of the public funds on some general rule of which all who come within it may have the benefit; or such as, at least, makes the public at large interested in encouraging or favoring the class or interest in whose behalf the exemption is made."

Cooley on Taxation, 215, (2d ed.)

Section 8 of article IX. of the constitution of Maine required that "all taxes upon real estate, assessed by authority of this state, shall be apportioned and assessed equally according to the just value thereof." The property of the Port-

land Water Company having been exempted from taxation for five years, the enactment was assailed as in conflict with the above provisions of the constitution. The exemption was sustained as given to aid in a work in which the public had an interest. The court say:

"The requirement is, not that all real estate shall be assessed, but that whatever is assessed shall be apportioned and assessed equally. The plaintiffs argue that a law which exempts water works in Portland from taxation, operates unequally, if it does not at the same time exempt all water works in the state from taxation. But all such works are not alike situated in respect to the benefits created by them. One set may be of vastly more consequence to the state than another. The state, through the general benefit to the public, may receive a sufficient compensation for the remission of taxes to one corporation and not to another. This state never has assessed all the real estate within its borders. We do not tax the forts and arsenals of the United States; nor the property of the state itself; nor lands, situated within the state, belonging to Massachusetts; and there are considerations justifying and requiring such exemptions. We are not satisfied that the legislature cannot by charter or contract, in any case and under any circumstances, for sufficient considerations, release one corporation from taxation, merely because it does not include in its exclusion from taxation, all similar corporations in the state.

"The property of the defendants has been appropriated and devoted to a public use, and may be exempted from taxation for the same reason that town houses and school houses and railroad tracks are exempted. It was only because their works were public works, that they could be permitted to take land for their purposes, under the exercise of the right of eminent domain. True, the title of the property is vested in the corporation. But the corporation holds it, to some extent, as a trustee for the public. It

must be used for the public, and, in a great measure, its use may be controlled by the public."

Portland v. *Water Co.*, 67 Me. 135, 136.

See also:

Crow v. *State*, 14 Mo. 237, 324.

Board of Supervisors v. *Auditor General*, 65 Mich. 408, 411-2.

Franklin County v. *Deposit Bank*, (Ky.) 9 S.W. Rep. 212.

The reasoning in these cases is equally applicable to the exemptions granted by the "gross earnings law" of Dakota. It is unanswerable; and fully sustains the proposition that the legislature had the right to exempt from taxation all the property that could lawfully be held by a corporation devoted, under its charter, to a work in which the public had an interest.

4.

RULE OF CONSTRUCTION.

The rule that a claim of exemption from taxation must be strictly construed, has no application here. That is a rule of construction in determining the meaning of the act. The meaning of this act is determined by the supreme court of North Dakota, in *N. P. R. R. Co.* v. *Barnes*, 51 N. W. Rep. 386. It is there settled that the *intention* was to grant the exemption; and the question here is, can that intention be carried out under the constitution,

or in other words, is the act constitutional? In determining this question the rule of construction is different from that employed in determining whether the act does make an exemption. An act is not lightly to be held unconstitutional. Every presumption is indulged in its favor; and if upon any theory it can be supported, that theory will be adopted. It is not sufficient that it does not appear clearly that an act is constitutional, to justify the court in declaring it unconstitutional; if it does not clearly appear that the act is unconstitutional, it must be sustained. If there be doubt as to the validity of an act, such doubt must be resolved in favor of the law.

Clark v. *People*, 26 Wend. 599, 606.

Santo v. *State*, 2 Iowa 165, 208.

Town of Bennington v. *Park*, 50 Vt. 178, 191.

Francis v. *A. T. & S. F. R. R. Co.*, 19 Kas. 303, 316.

Ferris v. *Vannier*, (Dak. T.) 42 N. W. Rep. 31, 40.

Hartford Bridge Co. v. *Un. Ferry Co.*, 29 Conn. 210, 227.

Lane v. *Dorman*, 3 Scam. 238, 240.

Foster v. *Bank*, 16 Mass. 245, 270.

Perry v. *Keene*, 56 N. H. 514, 530.

N. P. R. R. Co. v. *Roberts*, 42 Fed. Rep. 734, 745.

If this act received the approval of congress, it must stand against any objection on the score of inconsistency with the organic act

The territory was but a political subdivision of the outlying dominion of the United States. Congress could legislate for it as a state does for its municipal organizations. Its organic act was but an act of congress, and subject to change at the pleasure of congress. It was within the power of congress by approval to validate a territorial enactment, even though such enactment were in direct conflict with the provisions of the organic act. Congress could accept, amend or reject the territorial laws.

National Bank v. Yankton, 101 U. S. 129, 133.

And turning to the history of this legislation, we find strong reasons for a presumption that congress did not consider this "gross earnings law" in conflict with its existing enactments, or, if it did, validated the same by its approval. In 1883 an act like the one now under consideration, so far as the questions now in dispute are concerned, was enacted by the territorial legislature. It remained in force until 1889. That act created the greatest excitement in the territory. It was bitterly assailed upon every ground. During all of that time the territory had a representative in congress; and it is but reasonable to presume that this matter was brought to the attention of that body; and its failure to express its dissatisfaction in any manner with this legislation, may fairly be considered an approval thereof, a ratification not only of the existing law, but of the inter-

pretation of the organic act embodied therein.

Clinton v. *Engelbrecht*, 13 Wall. 434, 446.

Ferris v. *Vannier*, (Dak.) 42 N. W. Rep. 31, 39.

N. P. R. R. Co. v. *Barnes*, (N. D.) 51 N. W. Rep. 386, 397.

And such ratification is conclusive as to the constitutionality of this law, so far as the organic act is concerned.

In the case of *N. P. R. R. Co.* v. *Barnes*, 51 N. W. Rep. 386, the supreme court of the state of North Dakota passed upon the very questions presented here; and sustained the constitutionality of the law. Had that decision been a state supreme court decision upon a state constitution, it would be conclusive and binding upon this court. If it is not in the present case, it is because the constitution construed, is, owing to the relation between a territory and the United States, an act of congress. Whether, because of that fact the supreme court decision is not conclusive, may be a matter of doubt. And even conceding that it be not conclusive, it is entitled to the greatest respect and consideration. It should not be overturned except on clearest proof of error. And when we find such a decision supported, as it is, by the practice of the legislative assemblies, by the long acquiescense of congress, by the similar construction of similar legislation by the supreme courts of other states, we are fairly entitled to claim that

this question should be considered as settled. Such, too, is the fair result of the rule that doubt must be resolved in favor of the law. A doubtful question is one upon which reasonable men may honestly differ. And the existence of the law and of the supreme court decision evidencing a determination by the legislature and members of the court that this law is constitutional, forbids an assertion that it is unconstitutional beyond a doubt, under penalty of holding these men, fools and knaves. And unless unconstitutional beyond a doubt, it must be sustained. I respectfully submit that the court should sustain the constitutionality of this act.

QUESTION VII.

IS CHAPTER 107 OF THE LAWS OF DAKOTA, BEING AN ACT ENTITLED "AN ACT PROVIDING FOR THE LEVY AND COLLECTION OF TAXES UPON THE PROPERTY OF RAILROAD COMPANIES IN THIS TERRITORY," APPROVED MARCH 7, 1889, TO BE CONSTRUED AS GRANTING AN EXEMPTION OR COMMUTATION FOR AND DURING THE YEAR 1889, OR WAS SUCH EXEMPTION OR COMMUTATION TO BE IN FORCE AND EFFECT FOR AND AFTER THE YEAR 1890?

The question is certified at the request of counsel for appellees. It occurs for the first time in this certificate. Heretofore it has not been supposed that there was any doubt upon the point. Throughout the trial of this cause,

counsel for appellant have assumed, and counsel for appellees have conceded, that the intention was that the act should become operative immediately, and, if constitutional, should exempt the property from all taxes for the year 1889. In the very full and eleborate argument made in the circuit court, where the case was first heard under the title of *Northern Pacific Railroad Company* v. *Walker, et al.*, counsel for the counties, suggested no question as to the meaning of the act in this respect. In the briefs filed on the subsequent appeals to the circuit court of appeals and to this court, there is no hint of doubt as to the correctness of the appellant's construction. The briefs filed on the second appeal to the court of appeals are equally silent. The point suggested in the question is obviously an afterthought on the part of appellees; and the request that it be certified to this court for determination is not based upon any real doubt as to the meaning of the statute, but upon the hope that hasty consideration of the question by a court wearied with the case, and unfamiliar with the history of the legislation, *may* result in an erroneous adjudication thereof. In view of this constant acquiesence in this construction by appellees for over four years, it would seem that but little discussion of this questin is necessary.

The history of this legislation material to this part of the discussion may be briefly stated. By an act approved March 9, 1883,* the territory made an exemption of the property of the railroad companies, from taxation, similar to that contemplated in the act of 1889. This act took effect immediately, and operated to exempt all railroad property from taxes for that year, 1883. This was its construction by all the officers called upon to act thereunder, both territorial and county, and by the railroad companies

---

* Act Approved March 9, 1883.

§1. Percentage of Gross Earnings to be Paid in Lieu of Other Taxes.— In lieu of any and all other taxes upon any railroads except railroads operated by horse power, within this territory, or upon the equipment, appurtenances, or appendages thereof, or upon any other property situated in this territory, belonging to the corporation owning or operating such railroads, or upon the capital stock or business transaction of such railroad company, there shall hereafter be paid into the treasury of this territory, a percentage of all the gross earnings of the corporation owning or operating such railroad, arising from the operation of such railroad as shall be situated within this territory, as hereinafter stated, that is to say:

Every such railroad corporation or person operating a railroad in this territory shall pay to said treasurer each year for the first five years after said railroad shall be or shall have been operated in whole or in part, two (2) per centum of such gross earnings; and for and in each and every year after the expiration of the said five years, three (3) per centum of the said gross earnings; and the payment of such per centum annually, as aforesaid, shall be and is in full of all taxation and assessments whatever upon the property aforesaid. The said payments shall be made one-half (½) on or before the fifteenth day of February, and one-half (½) on or before the fifteenth day of August, in each year, and for the purpose of ascertaining the gross earnings aforesaid, an accurate account of such earnings shall be kept by said company; an abstract whereof shall be furnished by said company to the treasurer of this territory on or before the first (1st) day of February in each year; the truth of which abstract shall be verified by the affidavits of the

themselves. The first payments under this act became due in 1884, when, in consideration of the exemptions for the year 1883, a sum based on the earnings during the year 1883, was paid to the territorial treasurer.

N. P. R. R. Co. v. *Raymond*, (Dak. T.) 40 N. W. Rep. 537, 544.

Chap. 105, Laws of Dakota for 1889.

By chapter 105 of the laws of Dakota for 1889, approved January 29, 1889, the "gross earnings"

---

treasurer and secretary of said company, and for the purpose of ascertaining the truth of such affidavits and the correctness of such abstracts, full power is hereby vested in the governor of this territory, or any other person appointed by law, to examine under oath the officers and employes of said company, or other persons, and if any persons so examined by the governor or other authorized person shall knowingly or wilfully swear falsely concerning the matter aforesaid, every such person is declared to have committed perjury. And for the purpose of securing to the territory the payment of the aforesaid per centum, it is hereby declared that the territory shall have a lien upon the railroad of said company, and upon all property, estate and effects of said company whatsoever, personal, real or mixed. And the lien hereby secured to the territory shall have and take precedence of all demands, decrees and judgments against said company.

§2. Where Company Shall Fail to make Return.—If any railroad company in this territory shall fail to make return of its gross earnings, as aforesaid, or of any part thereof, at the time and manner provided by law, and such default shall continue during the period of thirty (30) days, such company shall be subject to a penalty in an amount equal to twenty-five (25) per cent of the tax imposed upon such company by this act. And the treasurer of the territory shall forthwith ascertain the amount of such tax justly due from such company, as nearly as may be, from such evidence as may be available, and shall thereupon collect such tax, as so ascertained, together with the said penalty thereon. The amount of tax ascertained by the territorial treasurer as in this section provided, shall, together with the said penalty thereon, be by him entered in the books of his office; and such entry when so made shall stand in

law of 1883 was repealed; with a proviso, however, "that this act shall in no wise affect the levy and collection of taxes upon the property of railroad companies in this territory for the year 1888." This was a legislative construction of the act of 1883, confirming the uniform practical construction of the act so far as affected the times of the payment. The language of the act of March 7, 1889, so far as it relates to the time when the exemption became effective fol-

---

place of the report required by law to be made by such company; and shall, in all courts within this territory, be evidence of the amount of such tax and penalty, and of the other facts stated therein in pursuance of this act.

§3. Neglect to Pay Taxes.—In case any railroad company shall fail or neglect to pay the taxes reported by it to be due, in pursuance of this act, for the period of thirty (30) days after the same shall have become due by the terms thereof, in such case there shall be added to the amount of such tax ten (10) per centum thereof, as a penalty for such failure or neglect to pay.

§4. Territorial Treasurer to Distrain.—At any time after the expiration of the period of thirty (30) days after any tax has become due and payable under the provisions of this act, the territorial treasurer or his deputy shall distrain sufficient goods, chattels or other movable property, if found within this territory, to pay the taxes or per centum due from such corporation, together with the penalty thereon herein provided; and shall immediately advertise the sale of the same in at least three newspapers published within this territory, stating the time when and the place where such property shall be sold. Such sales shall take place at some point on the railroad of such delinquent company, and at least four (4) weeks notice of the time and place of such sale shall be given. Such delinquent company, its successors or assigns, may pay any such taxes and penalty, at any time before the sale of property distrained as herein provided, and thereupon further proceedings in connection with such distress shall cease, and the property distrained be surrendered to the owner thereof.

§5. Lands Subject to Taxation.—The lands of any railroad company shall become subject to taxation in the same manner as other similar property, as soon as the same are sold, leased or contracted

lows the language of the act of 1883, and as the construction of that act was settled by the uniform contemporaneous practice of all officers called upon to act thereunder, and of the railroad companies themselves, and was well understood, it must be presumed that the same words when used in the act of 1889 were used in the same sense; to-wit: as creating an immediate exemption in consideration of the obligation of the railroad companies to pay to the state during the year 1890, the percentage of the earnings for the year 1889.

This has also been the construction placed upon the act of 1889 by those of the counties in the state, who, believing the law to be constitu-

to be sold or leased; and on or before the first day of April of each year, each railroad company having lands within this territory shall return to the county clerk of each county full and complete lists, verified by the affidavits of some officer of the company having knowledge of the facts, of all lands of such company situated in such county, sold or contracted to be sold or leased during the year ending the last day of December preceding, and the list furnished on or before the first day of April, A. D. 1883, in compliance with the terms of this section, shall include a complete list of all lands sold or leased or contracted to be sold or leased prior to the last day of December, A. D. 1882.

§6. How Tax Apportioned.—The moneys received and collected by the territorial treasurer in pursuance of the (this) act shall be disposed of by him as follows:

One-third (⅓) thereof shall be retained in the territorial treasury for the use of the territory and the remainder shall be apportioned among the several counties into or through which the railroads respectfully (respectively) run in proportion to the number of miles of main track situated in such counties respectively.

§7. That all acts or parts of acts in conflict with this act are hereby repealed.

§8. This act shall take effect and be in force from and after its passage.

Approved March 9, 1883.

tional, have omitted from the assessment rolls the lands of the appellant.

The language of the act confirms this uniform construction. Section 1 provides that the corporation "shall pay to said treasurer each year 'for the first five years' after the approval of this act an amount equal to three percentum of such gross earnings * * * and the payment of such amount annually as aforesaid shall be and is in full of any and all other taxation and assessment whatever upon the property aforesaid." In full of such taxation for what period? Clearly in full for the period during which the earnings were being made which were to serve as the basis by which to compute the amount to be paid for the exemption. The true measure of the value of a railroad is its earning capacity. And in ascertaining the value of the property for any particular year, the gross earnings for that particular year would naturally suggest itself to the legislative mind. And when the legislature sought to find in the earnings a standard by which to fix an amount to be received by the state in lieu of an *ad valorem* tax for any year, recourse was had to the earnings of that year, not to those for some other period. There is nothing in this section to suggest that it was the intention to tax the railroad property on an *ad valorem* basis for the year 1889, and in 1890 commute the *ad valorem* tax for a sum to be fixed by the earning capacity of the road for the preceding year.

The 10th section provides "this act shall take effect and be in force from and after its passage." The whole act became effective at once: the exemption as well as the obligation to pay the percentage. Upon what theory appellees propose to contend that the exemption did not come into operation until a year later, I am entirely ignorant, they having heretofore, as already stated, never suggested such a construction of the act.

Section 5 of the act provides that lands shall become subject to taxation in the same manner as similar property as soon as sold, or contracted to be sold. And to ascertain in each year what lands have become so taxable, all companies are required to return on or before April 1st of each year a list of the lands so sold or contracted to be sold during the preceding year ending December 31st. And it is provided that the list furnished on or before April 1st, 1889, shall include a complete list of the lands sold prior to December 31st, 1888. There could be but one purpose in this provision: that the lands so sold should be taxable for the year 1889. And the care thus taken to render the lands sold taxable, is clearly indicative of the legislative understanding that by the provisions of the act lands not so sold were exempted from such taxation. It is a legislative interpretation of the act inserted in the act itself; and is conclusive as to the meaning thereof.

QUESTION VIII.

IS SAID BILL WITHOUT EQUITY BECAUSE OF THE FAILURE TO AVER THAT THE COMPLAINANT HAS TENDERED OR PAID THE "GROSS EARNINGS TAX" FOR THE YEAR 1889; AND IS SAID COMPLAINANT ENTITLED TO THE EQUITABLE RELIEF PRAYED WITHOUT FIRST TENDERING OR PAYING SUCH TAX?

a. In the discussion of the propositions arising under this question, the constitutionality of the "gross earnings law" is, necessarily, conceded, but while admitting the constitutionality of the exemption, appellees deny the right of the company to claim the benefit thereof until the gross earnings percentage money is paid. It is an attempt to apply the familiar rule that he who seeks equity must do equity.

What is the extent of the rule? Says Mr. Pomeroy:

> "In states where a court of equity exercises a jurisdiction to set aside, or to restrain the collection of illegal assessments or taxes, the relief will not be granted unless the plaintiff pays such portion of the tax or assessment as is lawful and justly due."
>
> Pomeroy's Eq. Jur. sec. 393.
>
> *Morrison* v. *Hershire*, 32 Ia. 271, 277-8.

The rule is confined in its application, by the courts, to cases where the tax is excessive, or is partly legal and partly illegal.

> Cooley on Taxation, 763 (2nd ed.) and note.

The limitation of the rule is that the amount to be paid as a condition precedent to invoking

the aid of a court of equity, is the amount "conceded to be due, or what can be seen to be due on the face of the bill, or be shown by affidavits, whether conceded or not." "The state is not to be tied up as to that of which there is no contest, by lumping it with that which is really contested."

State Railroad Tax Cases, 92 U. S. 575, 617.

It is obvious, moreover, that in the application of this rule the court is restricted to the subject matter before it.

Thus, if A own the east half of a section; and the northeast quarter be exempt from taxation, it is no defense to an action to enjoin the sale of the northeast quarter for taxes, for the county or state to set up that A has not paid a lawfully levied tax upon the southeast quarter; or upon a drove of hogs, or other taxable property that he may own; although a different rule would prevail had A united such taxable property with his non-taxable property in the injunction suit. Applying the rule thus limited to the case at bar, it means that before the railroad company can invoke the aid of a court of equity to relieve it of the taxes assessed upon its lands, it must pay all the taxes justly due thereon; and the payment of the "gross earnings percentage" cannot be made a condition precedent to the granting of an injunction under this rule, unless the "gross earnings percentage" be a tax on these lands. That it is not, is self-evident.

b. The exemption from assessment and levy of taxes in the ordinary manner, made by the "gross earnings law," did not depend upon the payment of the three percentum of the gross earnings in the first instance, but upon the filing with the secretary of the territory of a resolution adopted by the railroad company and attested by its secretary, accepting the provisions of the act and subjecting the corporation to its terms. Immediately upon such action being taken by a railroad company which had qualified itself to accept the act by filing an account of the earnings under the act of 1883, and paying all percentages then due upon both interstate and territorial earnings as claimed by the territory, the exemption became effective. The liability of the railroad company to pay the percentage upon its gross earnings, by virtue of its acceptance of the act, rather than the actual payment, was the consideration upon which the exemption became effective. This appears from the provisions of the general revenue law of the territory and the necessary requirements of the "gross earnings law." As the "gross earnings law" required the payment of a certain percentage upon the gross earnings of each year, the earnings of that year must be completed before any payment can be made; thus for the year 1889, no payment could be made prior to 1890, when by the terms of the act the percentage was to be paid in two parts, one-half on or before February 15th,

and one-half on or before August 1st: nevertheless the exemption was complete for the year 1889. No taxes could be assessed or levied upon the lands or other property for that year. The general revenue act required all taxable property, real and personal, to be listed and assessed as soon as possible on or after the 1st day of May in each year, including all property owned on the first day of April of the year. (Sec. 1547 Compiled Laws of Dakota, 1887.) The assessors were required to make out and deliver the assessment roll to the county clerk on or before the first Monday of July of each year. (sec. 1582). The county commissioners were required to meet as a board of equalization for the purpose of equalizing and correcting the assessment roll, on the first Monday of July. (sec. 1584). And in equalizing the assessment they were to be governed by the value of the property on the first day of May preceding (sec. 1585). As soon as the assessment roll was equalized, and before the third Monday of July, the county clerk was required to make out an abstract of the assessment roll and transmit it to the territorial auditor. (sec. 1587). On the second Monday of August, the territorial board of equalization met to decide upon the territorial tax and to equalize the levy of such taxes throughout the territory. (sec. 1588). On or before the third Monday in August the territorial auditor was required to transmit to the county clerk of each county a

statement of the rate of taxation required in said county for the general territorial tax, (sec. 1590). On the first Monday of September of each year the county commissioners were required to meet for the levying of the necessary taxes for the current fiscal year, (sec. 1591). As soon as practicable after the taxes were levied, the clerk was required to make out a tax list and duplicate, and deliver the duplicate to the county treasurer on or before the first day of November, (secs. 1593, 1594). From this time on the taxes were due. They did not become delinquent, however, until the first Monday of February following, (sec. 1610). On that day they became delinquent, and a penalty of five per cent on the amount remaining unpaid was added, (sec. 1611). By section 1612 taxes upon real property were made a perpetual lien thereupon against all persons and bodies corporate, except the United States and the territory. As between vendor and vendee, taxes upon real property became a lien on and after the first Monday of November of each year.

The entire tax law of Dakota, the general revenue law and the gross earnings act, must be construed together. So construing them, was it the intention of the legislature that the exemptions under the gross earning act should be conditioned upon the actual payment of the percentage, a payment not to be completed before August of the succeeding year? Did the legislature intend that these various steps, re-

sulting, under the general revenue act, in a lien upon the property in favor of the counties, should be taken with reference to the property which the "gross earnings" act declare should be exempt from all taxation? Was it the intention that a lien in favor of the counties annually should attach to this property also, to be divested only upon the final payment of the percentage in August of the following year, and to be foreclosed upon failure to make such payment? Such a law would be supremely ridiculous. And such plainly was not the intention. No provision is made in the "gross earnings" act or in the general revenue law, for the release of this property upon making the percentage payment, from the lien in favor of the counties, if one attached by such proceedings; and annually such liens must accumulate in favor of the counties for taxes that would, with the annual percentage payment, cease to be due, constituting a perpetual cloud upon the title.

By the "gross earnings act" the territory was given a lien upon the railroad of the company, and upon all property, estate or effects of the company, real or mixed, to secure the payment of the percentum, and such lien took precedence of all demands, decrees and judgments against said company. By the fourth section of the act, the territorial treasurer was authorized to distrain and sell sufficient property to pay the amount due from the corpora-

tion in case of its failure to pay such amount when due, or within thirty days thereafter. This remedy given in the "gross earnings act" itself, it is clear was an exclusive remedy. The exemption from taxation under the general revenue law carried with it an exemption from assessment under that law, and from all the proceedings finally culminating in a tax levy. The proceedings of the taxing officers by which the lien under which the right to sell these lands was created, if created to all, were forbidden by law and were necessarily without effect. It is clear that if the lands be held not taxable because not segregated from the public domain, or because the non-mineral affidavits have not been filed, the failure to pay the gross earnings percentage cannot be a material factor in the case, and the company will be entitled to an injunction restraining the sale of the lands. And since the exemption by the "gross earnings act" is necessarily perfect upon the acceptance of the act, and nearly a year prior to the time when the first payment of the percentum is required, and is founded, not upon the actual payment, but upon the liability to pay, it is evident that the failure to make such payment cannot be a more material factor in considering appellant's equitable right to an injunction restraining the sale than it would where the ground of exemption is the interest of the government in the lands. The material question is the exemption. If that exist the ground

upon which it is founded, so long as it is not the actual payment of the per centum, is immaterial. Conceding the exemption, the right to the equitable relief cannot be questioned. The "gross earnings act" having provided an exclusive remedy for failure to pay the percentum by a distraint by the territorial treasurer, the railroad company is entitled to an order restraining the counties from seeking to collect another and unauthorized tax. Further, the failure to pay the gross earnings percentum is a question between the territorial officials and the railroad company; with it the county officials have nothing to do.

Since the failure to pay the "gross earnings" percentum would not give the counties the right to tax these lands as other lands are taxed, it is not essential to negative such failure in the bill of complaint; and no inference can be drawn from the absence of an averment, that no such payment has been made; and that portion of the opinion of the circuit court, holding that there is no equity in complainant's bill, is founded upon an assumed fact that is not in the record.

c THERE WAS, AND IS, NO "GROSS EARNINGS" PERCENTAGE DUE, AND THERE IS NO ONE AUTHORIZED TO RECEIVE SUCH MONEY.

Long prior to the time any payments became due under the act for the year 1889, it was repealed. No part of the "gross earnings" percentage for 1889 became payable until 1890, as prior to that time no report of the gross earnings of the company for that year could be made. Prior to that time, and on October 1, 1889, the constitution of the state of North Dakota was adopted, (Laws of North Dakota for 1890, p. 15). Under this constitution, and on November 2, 1889, North Dakota was declared admitted to the Union by proclamation of the president, (26 U. S. Stat. 1548).

Section 2 of the schedule of the constitution provides:

"All laws now in force in the territory of Dakota which are not repugnant to this constitution, shall remain in force until they expire by their own limitations or be altered or repealed."

Section 176 of article XI. thereof provides:

"* * * * But the legislative assembly may, by law, provide for the payment of a percentum of gross earnings of railroad companies to be paid in lieu of all state, county, township and school taxes on property exclusively used in and about the prosecution of the business of such companies as common carriers, but no real estate of such corporation shall be exempted from taxation in the same manner, and on the same basis as other real estate is taxed, except road-bed, right of way, shops and buildings used exclusively in

their business as common carriers, and whenever and so long as such law providing for the payment of a percentum on earnings shall be in force, that part of section 179 of this article relating to assessment of railroad property shall cease to be in force."

Section 179 of said article is as follows:

"All property, except as hereinafter in this section provided, shall be assessed in the county, city, township, town, village or district in which it is situated, in the manner prescribed by law. The franchise, roadway, road-bed, rails and rolling stock of all railroads operated in this state shall be assessed by the state board of equalization at their actual value, and such assessed valuation shall be apportioned to the counties, cities, towns, townships and districts in which said roads are located, as a basis for taxation of such property in proportion to the number of miles of railway laid in such counties, cities, towns, townships and districts."

It is apparent from these provisions that the power to pass a gross earnings law exempting the lands granted to the company was withheld from the legislature. The gross earnings law of 1889 was therefore repealed by the adoption of the constitution, as repugnant to it.

The law is well settled that when a statute is repealed it must be considered (except as to transactions passed and closed) as if it had never existed. The authority of an officer to act thereunder terminates with the repeal, unless the right so to act is especially saved in the repealing act. Where a statute requires a certain tax to be collected and the act prescribing the method of such collection is repealed before the collection is made, or the tax due, and

there is no saving clause, the right to make such collection is gone, and all proceedings for the collection of the tax, after such repeal, are void.

McQuilkin v. *Doe*, 8 Blackf. 581, 583.

The Marion Township Gravel Road Co. v. *Sleeth*, 53 Ind. 35, 41.

Tivey v. *People*, 8 Mich. 128, 130-1.

Hunt v. *Jennings*, 5 Blackf. 195.

Abbott v. *Britton & Koontz*, 23 La. An. 511.

French v. *State*, 53 Miss. 651, 653.

Musgrove v. *V. & N. R. R. Co.*, 50 Miss. 677, 681.

Not only is the authority of the treasurer to receive this money, and, by his receipt, give the company full acquittance for all taxes gone; but also all right and claim of the territory to the percentum itself.

Prior to the time it became due in February, or certainly prior to January 1, when the gross earnings upon which the tax was to be computed, were completed, there was no amount due whatever. The territory had no vested right in any sum; its claim at best amounted to no more than an inchoate right. With the repeal of the act without a saving clause, all possibility of this inchoate claim ripening into a perfect right was extinguished. There never was, therefore, any amount due the territory or state under the "gross earnings law" as the percentage upon the earnings for 1889; and the company is not, and never has been, under any obligations, legal or equitable, to pay or tender

such sum. For a thorough discussion of these principles, see:

Blackwell on Tax Titles, sec. 1047-8-9, (2d ed.)

Cooley on Taxation, 18, (2d ed.)

Bleidorn v. *Abel*, 6 Ia. 5.

Van Inwager v. *City of Chicago*, 61 Ill. 31, 34.

The Marion Township Road Co. v. *Sleeth*, 53 Ind. 35, 41.

Commonwealth v. *Standard Oil Co.*, 101 Pa. St. 119, 150.

Board of Commr's v. *Ruckman*, 57 Ind. 96, 101.

Bennet v. *Hargus*, 1 Neb. 419.

Butler v. *Palmer*, 1 Hill. 324, 330, *et seq.*

d. A VALUABLE CONSIDERATION FOR THE EXEMPTION FROM TAXATION, WAS, IN FACT, GIVEN BY THE RAILROAD COMPANY AND ACCEPTED AND RETAINED BY THE STATE.

The "gross earnings" law of 1889 is an offer on the part of the territory to make a contract with any railroad company by the terms of which the company obligates itself to pay to the territory a certain percentage of the company's gross earnings, and the territory, in consideration of such obligation, agrees to exempt from any and all other taxation the property of the company. Such, however, were not the only considerations moving from the company. An examination of the condition of affairs preceding the passage of this act is necessary to a complete understanding of its provis-

ions. By the second section of the act of congress of July 2, 1864, incorporating complainant, it is provided that "the right of way shall be exempt from taxation within the territories of the United States." This exemption from taxation includes all buildings, superstructures, etc., that were attached to the soil of such right of way.

N. P. R. R. Co. v. *Carland*, 5 Mont. 146; s. c. 3 Pac. Rep. 134.

Under the provisions of the act of congress approved July 15, 1870, 16 Stat. 291, the lands granted to the Northern Pacific Railroad Company could not be taxed until the company had paid "into the treasury of the United States the cost of surveying, selecting and conveying" the lands granted to the company. The railroad company did not, prior to 1887, pay such fees upon lands owned by it, and hence its lands were not taxable.

N. P. R. R. Co. v. *Traill Co.*, 115 U. S. 600.

There was, therefore, subject to taxation within the territory, but a small amount of personal property of the company. By the act approved March 9, 1883, (see note on page 157,) the territorial legislature provided for a commutation of taxes upon the payment of a sum of money computed upon a gross earnings basis, in a manner similar to that provided in the act of 1889. There were, however, some important distinctions between the acts. Railroad companies

were not required to file an acceptance of the provisions of the act of 1883. The gross earnings upon which the amount to be paid under that act were to be computed, were "the gross earnings of the corporation owning or operating such railroad, arising from the operation of such railroad as shall be situated within this territory." The provisions in the act of 1889, defining the gross earnings as the earnings arising from both territorial and interstate traffic, were lacking. The obvious purpose of the act of 1883 was to secure a revenue from the Northern Pacific Railroad, since nearly all of its property was beyond the reach of taxation. This was apparent, although the law was couched in general terms, from the well known fact that the Northern Pacific was the principal, if not the only, road then in the territory. The Northern Pacific complied with the terms of this act as construed by the territorial officials, until 1887, and paid the percentage upon all its gross earnings, earnings arising from the interstate as well as territorial traffic. By an act approved July 10, 1886, 24 Stat. 143, congress provided that no lands granted to aid in the construction of a railroad should be exempt from taxation on account of the lien of the United States upon the title papers thereof for the costs of surveying, selecting and conveying the same. In 1887, the first year in which, by virtue of the above act, the Northern Pacific lands became taxable, many of the counties in the terri-

tory in which such lands were situate, proceeded to assess and levy taxes upon these lands precisely as other lands were taxed, disregarding the provisions of the gross earnings law, which they contended, first, did not exempt the lands from taxation, and, second, if it did, was unconstitutional. The railroad company, anticipating no such action, constituting what was, from its standpoint, a breach of contract upon the part of the counties, returned to the territorial treasurer on or before February 1, 1887, an abstract showing its earnings upon both territorial and interstate traffic for the year 1886; and March 15, 1887, paid to the territorial treasurer, $38,095.31, as the first half of the sum to be paid in lieu of taxes under the law, the second half not being due until on or before August 15, 1887. Prior to August the counties acting under the direction of the territorial auditor (see Report of Territorial Auditor for period ending November 30, 1888, p. 210) proceeded, as I have said, to assess the lands. The railroad company at once prepared for a vigorous resistance to what it considered an unwarranted attempt to appropriate its property. Rousing from its previous easy acquiescence in the construction placed upon the phrase, "grosss earnings of the corporations owning or operating such railroad arising from the operation of such railroad as shall be situated within this territory," by the territorial officers, as including the earnings on both terri-

torial and interstate traffic, it challenged the correctness of such construction, insisting that it was beyond the power of the territory to lay a tax upon the interstate earnings, as such a tax would be a tax upon interstate commerce; and that the gross earnings upon which the percentage was to be computed must be restricted to territorial earnings. In August, 1887, acting upon this construction, it refused to make the second payment for 1886, claiming that the first payment in March, of $38,095.31 was more than was due for the entire year, computing the amount to be paid upon the territorial earnings alone, and that such payment satisfied the entire amount due for the year. The territorial treasurer insisting that the "gross earnings" law was valid and included a percentage based on interstate as well as territorial earnings, and ignoring the acts of the counties taken in open violation of the law, distrained upon certain property to recover the gross earnings percentage claimed by him to be due. The railroad company brought suit to enjoin the sale of its property, basing its action upon the grounds stated. The case having been carried to the territorial supreme court, the company's position was there sustained in a decision rendered October 13, 1888.

N. P. R. R. Co. v. Raymond, (Dak.) 40 N. W. Rep. 538.

In 1888, in making the payments of the percentage of the gross earnings of 1887, the com-

pany, adopting the same basis, made its two payments of $5,333.14 each; although computed upon both interstate and local earnings, the percentage would have been $76,251.74; and the balance remaining due, computed upon that basis, would have been $65,585.46. Adding to this the percentage upon the same basis for the last half of 1886, $38,095.31, enjoined in the Raymond suit, *supra*, there was $103,680.77 due, upon the territory's construction of the "gross earnings" law, for the years 1886 and 1887, which, under the Raymond case, *supra*, could not be collected. There was the further amount for the percentage of 1888, of $93,874.18, to be paid in equal installments in February and August in 1889; the greater part of which must also fail under the Raymond decision. There was therefore due, under the construction that had been contended for by the territory, at the time of the adoption of the gross earnings law of 1889, over $135,000, which, under the territorial supreme court decision could not be collected.

In the meantime, the company had resisted with equal vigor the attempt to tax its lands in defiance of the "gross earnings" law. It promptly brought suits to restrain the sale of its land for taxes, claiming they were exempt by the provisions of that act. In some of the lower courts these suits were sustained; in others, dismissed. In those cases where its suits were dismissed, it appealed to the supreme court.

It was finally agreed that certain cases should be selected as test cases, and the remainder abide the result. And these test cases, although since determined in favor of the railroad company, (*N. P. R. R. Co.* v. *Barnes*, 51 N. W. Rep. 386; *N. P. R. R. Co.* v. *Brewer*, 51 N. W. Rep. 787; *N. P. R. R. R. Co.* v. *Strong*, 51 N. W. Rep. 787; *N. P. R. R. R. Co.* v. *Tressler*, 51 N. W. Rep. 787;) were pending undetermined in the spring of 1889. January 29, 1889, the "gross earnings" law of 1883 was repealed. Such was the condition of affairs when the act of 1889 was passed. The railroad company had shown itself amply able to protect its own interests. The brilliant financial plans of the territorial and county officials had dismally failed. The golden harvest anticipated from the tax upon the lands had not come to fruition; and the officers were in grave fear (as the event shows, with good cause) that it would never mature. Not only had these hopes failed to materialize, but they had lost the percentage computed upon the interstate earnings, and the revenue derived from the "gross earnings" percentages had fallen off as the the result of their efforts, $103,680.77, for the years 1886 and 1887, and would further fall off for 1888 over $75,000. Under these circumstances the act of March 7, 1889, was passed. By the 7th section the payment of all sums and interest due under the act of 1883, including percentages on both territorial and interstate

earnings, was required as a condition precedent to the acceptance of the contract tendered by the state. It further required any company which had not paid such percentages or made a return of its earnings on both territorial and interstate traffic under the act of 1883, to make such return within thirty days from the date of the act, "and pay one-half of the entire amount due under the agreement and acceptance herein referred to, for the current year, and also the entire amount of taxes heretofore claimed by the territory on local and interstate earnings of such companies but remaining unpaid at the time of filing said account and within tl irty days after the passage of this act, or the same shall not apply to such company or companies. The balance of such taxes due for the current year shall be paid to the territorial treasurer on or before the 15th day of August 1889."

The Northern Pacific Railroad Company accepted this act: and as a condition precedent made a return to the territorial treasurer of its earnings on interstate as well as territorial traffic for the years in which it had not made such return under the act of 1883, and paid the percentage thereon April 4. 1889 as follows:

For the last half of 1886	$ 38,095.31
For 1887	65,585.46
For the first half of 1888	46,937.09
Total	$150,617.86

Record, 5, 6.

Of this amount, all of the moneys paid for 1886 and 1887, and the greater portion of that paid for 1888 was a percentage computed upon interstate traffic; that is, over $140,000 of this sum was money upon which, under the decisions of its supreme court, the territory had no claim of any kind, legal or equitable; it was a cash payment made, in part at least, in consideration of the exemptions made by the act of 1889. In addition thereto, the company obligated itself to pay in August, 1889, the last half of the gross earnings percentage for 1888 computed on both territorial and interstate traffic. This amounted to $46,937.09; and, it may be added, it did pay this sum in August 1889. The greater portion of this amount also was derived from interstate traffic; and to say that the railroad company paid into the territorial treasury, for distribution among the counties in accordance with this act and the act of 1883 as amended thereby, over $175,000 cash, is a conservative estimate. There was also the further consideration of the percentage to be paid on the gross earnings, both territorial and interstate, for 1889. Such were the considerations paid by the railroad company for the exemptions of the act of 1889. In the fall of 1889 the act was repealed. In 1890 the property of the railroad company was assessed and taxed. In 1890, with an increased amount of rolling stock, with more lands subject to taxation, with prop-

erty in better shape than in 1889, the land and operating taxes of the company in Dakota, (not including tax on right of way, not taxable in 1889) amounted to $116,371.64, *or over $55,000 less than the cash actually paid to the territory in 1889 under the provisions of these acts.*

If the supreme court of the territory construed the act of 1883 correctly in *N. P. R. R. Co.* v. *Raymond*, 40 N. W. Rep. 538, and *N. P. R. R. Co.* v. *Barnes*, 51 N. W. Rep., 386, (and this court cannot question that construction, so far as it determines the meaning of the territorial act. *Stutsman County* v. *Wallace*, 142 U. S. 293, 306,) this immense sum of over $175,000 must be considered as a cash consideration for the exemptions contained in the act of 1889. Certainly the counties cannot justly complain of a lack of equity while they retain this sum, amounting to double the entire tax assessed upon the lands.

If the court erred in *N. P. R. R. Co.* v. *Barnes*, *supra*, and the dissenting opinion of Chief Justice Corliss correctly stated that the law of 1883 was unconstitutional as an interference with interstate commerce (see 51 N. W. Rep. 406,) the territory had no claim upon these percentages for past years and they must be deemed a cash consideration for the exemptions in the law of 1889.

In any view but one the railroad company must be considered as having paid, under this law, into the territorial treasury a sum far

greater than the taxes upon the lands for the same year could have amounted to. And in all of these views that payment is an incontrovertible answer either to discrimination or lack of equity. In either of the views considered, the attempt by the counties to tax these lands after the state has collected more than the amount of the tax in consideration of exemption, occupies the same moral plane as the exercise of the blackmailer's art.

The one remaining view may be briefly considered. This view concedes the interpretation of the act by Chief Justice Corliss to be correct. The law of 1883, in so far as it attempted to impose a tax upon interstate commerce could not be enforced. It could be defeated by the carrier; but the carrier was under no obligation to protest It could consent to the imposition, and by so consenting and paying the percentages, a contract would arise between the parties which would become, with the final payments made each year, an executed contract between the parties for that year. In this view the law of 1889 must be considered as an attempt by the territory to induce the railroad company to accept its interpretation of the act of 1883 (the interpretation was then in dispute), waive the objections which the company could constitutionally raise, and execute the contracts by paying the percentages for the past years, and obligating itself to pay the percentage for the last half of 1888; and the exemptions in the law of 1889 are offered as

the inducement. In this view of the law, the correct one we think, there is also a consideration actually given by the railroad company and accepted by the territory for the exemption for 1889. And the territory having accepted the consideration given for the exemptions ought now to be estopped from claiming that the company's conduct is inequitable.

We respectfully submit that the bill is not without equity because of a failure to aver that complainant has tendered or paid the "gross earnings tax" for the year 1889; and that complainant is entitled to the equitable relief prayed without first paying or tendering such tax.

FRED M. DUDLEY,
Counsel for Appellant.

EXHIBIT "A."

[From The Weekly Olympian Tribune (Washington) of July 20th, 1893.]

(Since the first part of this argument was printed, this decision has been reported in 34 Pac. Rep. 163.)

Columbia & Puget Sound Railroad Company, respondent, vs. A. Chilberg, treasurer, etc., appellant. No. 783. Filed July 11, 1893. From King county.

A. F. Burleigh, attorney for respondent.

George Donworth and James B. Howe, attorneys for appellant.

It is contended on the part of the appellant that the act of November 28, 1883, commonly known as the "gross earnings" law, was void for the reason that it was in conflict with the organic law of the territory. The provision of the organic act which it is claimed was violated in its enactment was as follows: "All taxes shall be equal and uniform, and no distinction shall be made in the assessments between different kinds of property, but the assessments shall be according to the value of the property."

If the legislation in question established a different rule of taxation as to any class of property from that by virtue of which taxes are imposed upon other classes, it was void by reason of such conflict. Such, however, is not the necessary construction of the act in question. A more reasonable interpretation thereof is that it did not attempt to prescribe any rule of taxation. Under this provision in the organic act, there can be no doubt of the right of the legislative assembly to exempt the property of any person or corporation. Such has been the holding of nearly or quite all of the courts of the different states under constitutional provisions requiring assessments to be according to value, as broad and full as the clause of the organic act above set out. It must, therefore,

under the authorities be held that under said provision it was within the power of the legislative assembly to have entirely exempted the property of all railroad corporations from taxation, and, if this could be done without any consideration being received therefor, it certainly could be for what was deemed by the legislature a sufficient consideration. It must, therefore, be held that the act in question was not void by reason of its conflict with the provisions of the organic act.

It is further claimed on the part of the appellant that, if the law is valid, it did not exempt other property of the corporation than that actually used in its operation. We think, however, that the language used is so broad that it must be held to cover all of the property of the corporations entitled to the benefits of the act. The cases cited by appellant upon this branch of the case would de decisive of the question if the language used by the legislature had been such as to leave room for any interpretation thereof by the courts, but the language of the act is so broad and certain that, the power of the legislature once being conceded, there is no room for holding otherwise than that the act exempted all of such property.

The appellant further contends that even although the act is valid, and that for that reason the property was not liable to assessment for territorial and county purposes, it should still be held that the exemption did not extend to taxes sought to be imposed by municipal corporations by virtue of the powers conferred upon them in their charters. If the charter of the city of Seattle had made use of the broad language cited in the brief of appellant, without any qualification thereof, there would be much force in this contention; but in the charter of said city the broad language by which it is given the right to impose taxes upon all property, both real and personal, within the city, is limited by this pertinent clause, "which is by law taxable for territorial and county purposes," and when so limited it affords no foundation whatever for this contention of appellant. The city derived all its power to impose taxes upon any property by virtue of the express provision of its charter, and when such express provision contained, as a part thereof, a clause

which limited the property which might be so taxed to that which was by law taxable for territorial and county purposes, it follows that whenever any class of property was by law exempted from taxation for territorial and county purposes the city was, by the terms of its own charter, deprived of any power to impose taxes thereon. There is, therefore, no foundation for the application of the rule that a general statute will not ordinarily affect or repeal a special statute, upon which the appellant founded its argument upon this branch of the case.

We feel compelled to hold that the law was valid; that it covered all the property of the corporation respondent; and that it exempted the same not only fr m territorial and county taxes but that by virtue of such exemption the city of Seattle was deprived of the right to impose any taxes thereon, by the provisions of its own charter. The judgment must be affirmed.

HOYT, J.

We concur: Dunbar, C. J., Anders, J., Scott, J., Stiles, J.

Office Supreme Court U. S.
FILED.
APR 12 1894
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

No. 1045.

NORTHERN PACIFIC RAILROAD COMPANY,
APPELLANT,

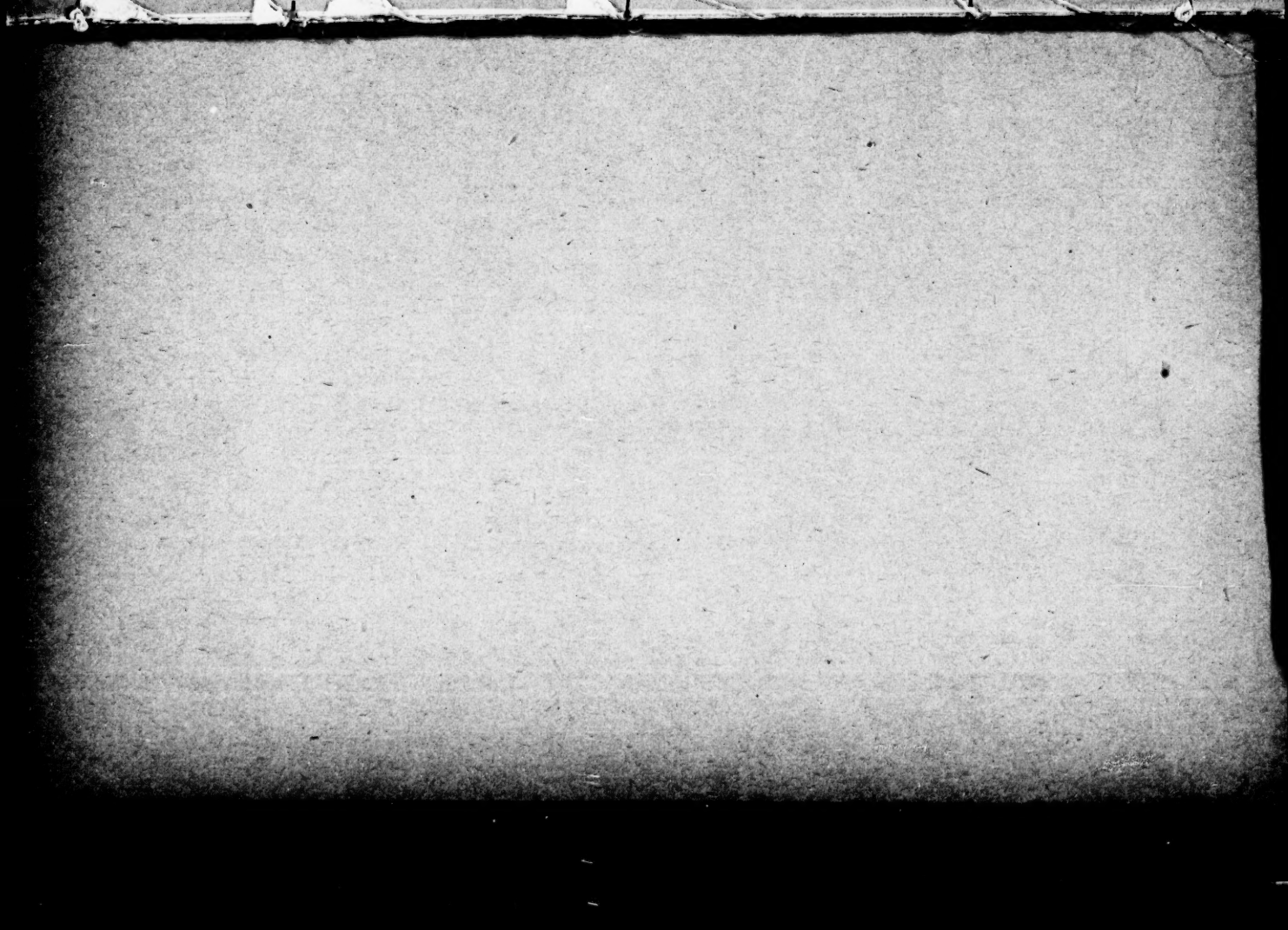
vs.

A. G. CLARK, COUNTY AUDITOR OF KIDDER COUNTY, N. D., ET AL., APPELLEES.

Appellees' Admissions Collated by Appellant.

FRED. M. DUDLEY,
Counsel for Appellant.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.



IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

No. 1045.

NORTHERN PACIFIC RAILROAD COMPANY,
APPELLANT,

vs.

A. G. CLARK, COUNTY AUDITOR OF KIDDER COUNTY, N. D., ET AL., APPELLEES.

Appellees' Admissions Collated by Appellant.

Contained in the briefs filed on behalf of the appellees in this case when it was before the Court at the last term under the title of *Northern Pacific Railroad Company* vs. *Chas. S. Walker et al.*, which briefs we understand are relied upon by appellees in this case, and also in the brief filed herein by W. H. Standish, attorney for A. G. Clark, county auditor of Kidder county, are admissions of material propositions of law urged by appellant in support of its contention. For the convenience of the Court we have collated such admissions, and we respectfully ask that they be given all

the weight which an admission of a legal proposition against the interest of the party making such admission is entitled to.

I.

[Brief of W. H. Standish, p. 2.]

"Can the taxed lands be identified as the lands granted? If they cannot be so identified, we would not for a moment contend that those lands had been rendered taxable."

II.

QUESTION II.

[Brief of W. H. Standish, p. 10.]

"It is evident that before this question can be properly answered, it must be determined whether this controversy is *properly* pending before the department; or, more plainly, whether the decision of the department thereon must precede the passing or attaching of title. If it must, then title has not yet attached, and the lands are non-taxable."

[Brief of Camp and Glaspell, p. 7.]

"If said lands were not known to be mineral lands at the time of filing said map, then the question of their actual present character as mineral or not is wholly irrelevant and immaterial; the officers of the United States have no authority to withhold patents pending the ascertainment of such immaterial fact. The right of the appellant to patents for the lands is complete and *therefore* the lands are taxable."

III.

[Brief of W. H. Standish, p. 12.]

"We would not for a moment contend that said lands are taxable, if the furnishing of non-mineral affidavits is an act going to the foundation of the company's *right* to the patent."

[Bill of complaint, Record, p. 3.]

"And your orator further shows that since said lists were so filed and transmitted to the Commissioner of the General Land Office as aforesaid the said Commissioner of the General Land Office, under the direction of the Secretary of the Interior, has required your orator to file in the office of the Commissioner of the General Land Office or in the office of the United States land district in which such lands may be situate an affidavit, made by some person acquainted with the character of said land, setting forth and showing that the same is non-mineral, and has refused to certify or approve for patent said lists until such affidavits shall first be filed by your orator."

IV.

[Brief of Messrs. Camp and Glaspell, p. 14.]

"We admit that it was the intention of the legislature of Dakota in enacting this statute to release from taxation all property which a railroad, paying in the stated percentage of gross earnings, might chance to own, including the lands here involved. And we admit that the language of the act expresses such intention."

[Brief of W. H. Standish, p. 31.]

"It is insisted that the intent of the act under consideration was to exempt the granted lands referred to, and the

question certified which we are now considering seems to admit that intent."

V.

THE XIVTH AMENDMENT.

[Brief of Messrs. Camp and Glaspell, p. 24.]

"It is true that in consideration of public services persons may be relieved of the burdens of taxation on such a sum and on such an amount of property as the legislature may deem best."

[Brief of W. H. Standish, p. 26.]

"Nor do we contend that this amendment (the XIVth) affects the power of the State to grant exemption of certain classes of property from taxation, but only that it so limits that power as to render it applicable only to classes of property used for the protection of the public well-being, and not for any private end—such classes, for illustration, as are mentioned by the learned counsel for the appellant (p. 84)."

[Appellant's brief, p. 84.]

"Thus, a classification of property as the property of members of the national guard, is recognized. In many of the States members of the militia or fire departments are exempt from poll tax. Exemptions from taxation of all the property of certain charitable or educational institutions have been sustained. Property in the hands of ministers has been classified for purposes of taxation differently from similar property in the hands of laymen. The law in some cases has classified the property of old soldiers for taxation."

[Brief of Messrs. Camp and Glaspell, p. 28.]

"If appellant had received these lands from the Territory on condition of building and operating the road and had its

territorial charter exempted the land grant from taxation, then the exemption would have been given for value and would have been valid."

[Brief of Messrs. Camp and Glaspell, p. 26.]

"The exemption made by section 711 of the Revised Code of Iowa, merely provides for exemption of such property as is in the use and occupation of those so poor that any contribution to the public fund would cause distress. The State having to support the indigent, it would be *poor policy* to add to the number of paupers by taxing the very poor."

These admissions that exemptions based upon considerations valuable to the State are constitutional, necessarily imply a concession that a State may rightfully grant an exemption if it be for value received.

VI.

Organic Act.

[Brief of W. H. Standish, p. 31.]

"We do not contend that this section affected the power of the Legislative Assembly to apportion taxation or to classify property for that purpose; but only that it limited the Legislative Assembly to two certain methods in the exercise of that power, viz., such method as should be free from discrimination either for or against any one kind of property relatively with other kinds of property, as so classed, and such method as should lay an *ad valorem* tax upon all property subject to taxation."

[Brief of Messrs. Camp and Glaspell, p. 30.]

"We admit that the organic act does not prohibit exemptions from taxation."

[Brief of W. H. Standish, p. 32.]

"We admit that the Legislative Assembly, so far as any restriction which seems to have been imposed by the organic act was concerned, might probably have exempted some particular classes of property from taxation, either expressly or by failure to select such classes as subject to taxation, and we have no reason to question the soundness of the many decisions referred to in support of this legislative power."

[Brief of Messrs. Camp and Glaspell, p. 35.]

"We quite agree with the appellant's position that the adequacy of the consideration paid for the exemption is wholly for the legislature. If the law-maker has power to exempt at all, he has power to make the exemption a gratuity or to make it upon any condition. The only question for a court is whether or not the legislature had the power to exempt at all the property involved, and so in this case the amount paid by the appellant for this exemption is of absolutely no moment."

[Brief of Messrs. Camp and Glaspell in "Walker case," pp. 27, 28.]

"Undoubtedly, as appellant contends, the State may encourage railroads, just as it may encourage manufacturers, by bounties or by exemptions."

FRED. M. DUDLEY,
Counsel for Appellant.

Office Supreme Court U.S.
FILED.
MAR 24 1894
JAMES H. McKENNEY,
CLERK.

IN THE SUPREME COURT

Of the United States.

OCTOBER TERM, 1893.

No. 1045.

NORTHERN PACIFIC RAILROAD COMPANY.
Appellant,

vs.

A. G. CLARK,
County Auditor of Kidder County, N. D., *et al.*,
Appellees.

Certificate from the United States Circuit Court of Appeals for the Eighth Circuit.

ARGUMENT FOR APPELLEES.

W. H. STANDISH,
Counsel for Appellees A. G. Clark, County Auditor of Kidder County, N. D.

BISMARCK, N. D.:
TRIBUNE, PRINTERS AND BINDERS.
1894.

IN THE SUPREME COURT

Of the United States.

OCTOBER TERM, 1893.

No. 1045.

NORTHERN PACIFIC RAILROAD COMPANY.

Appellant.

vs.

A. G. CLARK,

County Auditor of Kidder County, N. D., *et al.*,

Appellees.

CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

ARGUMENT FOR APPELLEES.

QUESTION I.

Are the odd numbered sections of land within the place limits of the grant to the Northern Pacific Railroad Company by the Act of Congress

approved July 2, 1864, which were not, and are not known to be mineral, and which were at the dates of the grant and of filing the map of definite location in the office of the Commissioner of the General Land Office, lands not reserved, sold, granted or otherwise appropriated, and for which there were at said dates no entries or filings, or applications to make entry or filing, of any kind, of record in the United States district land offices for the districts in which such lands were situate, or in the office of the Commissioner of the General Land Office, so identified by these facts as granted lands, non-mineral and free from claims or rights, and so segregated from the public domain as to attach to the specific tracts the title vested in the railroad company by the grant of July 2, 1864, and render them taxable, said lands being unpatented and uncertified to the railroad company?

It being admitted as settled, that this act makes a grant *in praesenti*, the foregoing question, simplified, is: Can the taxed lands be identified as the lands granted?

If they can not be so identified, we would not for a moment contend that those lands had been rendered taxable; if they can be so identified, it is not disputed that those lands had been rendered taxable.

The language of the question is an admission

that those lands can be so identified, with the exception of such, if any, as were, or are, mineral lands, and of such, if any, as were not free from pre-emption or other claims or rights at the time when the line of railroad was definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office.

1. As to the condition of the lands with reference to adverse claims or rights.

The question certified admits that all of the lands were, at the date of definite location, free from such claims or rights, *so far as the records then disclosed.*

It is to be determined then, whether this admission is equivalent to an admission that the lands were, at that date, free from such claims or rights.

The learned counsel for the appellant candidly admits (pp. 18 and 19), that this court has already decided this question in the affirmative in

K. P. Ry Co. vs, Dunmeyer, 113 U. S. 629,

setting out the language of the court; and that "when the courts have had occasion to touch this question they have uniformly announced a similar doctrine," citing numerous cases.

But reliance is placed upon decisions of the Interior Department, as being in conflict with the decisions of the courts. While decisions of the Secretary of the Interior, on questions of fact

arising in the administration of the land office, are probably conclusive upon the courts, if made in the performance of his official duties and no fraud is shown, and if in accordance with the regular rules of practice of the department and based on legal evidence or formal inquiry at which the parties have a fair opportunity to present evidence in support of the rights which they assert, we think it can hardly be urged in seriousness that the decisions of that department, on questions purely of statutory construction can be in like manner conclusive.

But is not the conflict in this instance, so far as it may possibly be applicable to the case at bar, less real than imaginary? There appears to be no conflict upon the question of the conclusiveness of the records, but only as to the *time* as of which the records shall be deemed conclusive. I understand the law as laid down by the courts to be, that the records *as they stood at date of definite location* must determine conclusively whether or not there existed, at that date, adverse claims or rights; while the department seems to hold that *occupation*, at that date, by a *qualified entryman*, in absence of record evidence at that date, is sufficient to bring the land within the description of "not free from pre-emption or other claims or rights."

But even under the rulings of the department,

the records must ultimately show the required facts of *occupation* and *qualification of the entryman;* for there is a limit to the period of time during which even a qualified entryman may preserve any vestige of claim or right by mere occupation. His claim or right is only in the nature of an option: and from the moment when that limit of time is reached, his possession is by mere sufferance. That moment, the status of the land becomes the same as if that claim or right of option *had never existed*, and title in the railroad company attaches *as of the date of definite location.* Any other conclusion would lead to absurd and damaging results, and would be in conflict with the uniform rulings of the department, upon which the rights of individual homesteaders and other claimants are based.

But it may be contended that our admission that there might have been instances in which this question would have had to be determined by record evidence entered subsequently, is equivalent to an admission that the records as they stood at date of definite location were not conclusive. We do not so consider, keeping in mind the language of the granting act. By that act title to all lands of certain description and not falling within the exception at date of definite location, passed to the railroad company. There being then no record evidence that any of

those lands did fall within the exception, the presumption arose that there were then no such lands. That presumption, however, may not have been, on that date, a conclusive presumption, but the moment that the time was reached when all unrecorded claims or rights, which had existed on that date, expired by limitation and became as if they never had existed, then that presumption became *conclusive*. In this case it is not averred that there ever, in fact, existed any such claim or right as to any part or parcel of the lands; and yet this court is now asked to presume that such claims or rights did then exist, which would be to presume an exception to the destruction of the rule.

Therefore, we submit, is it not clear that, under all the circumstances of this case, the records, as they stood at date of definite location, should now be deemed conclusive on this point? If so, none of the lands can possibly fall within this exception.

2. As to condition of the land with reference to minerals.

The question to be determined is, whether the admitted condition that they were not, and are not, known to contain mineral is equivalent to the required condition that they should not contain mineral.

It seems to be admitted that this court has

held, and that it has been generally held by the courts, that the term "mineral land," as it is used in the granting act, "means only those lands containing mineral in quantities sufficient to add to their richmess and to justify expenditures for its extraction, and known to be so at the date of the grant;" the case of

Davis vs. Wiebbold, 139 U. S. 507, 519,

and other cases, being cited by counsel for appellant, p. 35.

If this is the true definition, the admitted condition is equivalent to the required condition, as the learned counsel candidly admits.

But again reliance is placed upon decisions of the Interior Department, as giving a different definition, or more properly, as placing a different construction upon the language of the granting act. Secretary Noble is quoted in

C. P. R. R. Co. vs. Valentine, 11 L. D. 238,

as claiming jurisdiction to determine the character of the land, with reference to mineral, and that such jurisdiction exists until patent or certification.

As to jurisdiction of the department to determine this question of fact, it is not questioned. But to construe the language of the law to mean some other question of fact than that actually intended, and that by giving to its most material words a meaning totally different from their

meaning as judicially interpreted, would seem to be beyond the powers of the Interior Department.

The fact to be ascertained is a negative one, and it can never, perhaps, be said of any specific tract, at any given time, that it is known to be non-mineral, but only that it is not known to be mineral. It must first be determined by what standard this negative condition may be ascertained, within the meaning of the act. This has been done by the courts. There must necessarily be some limit of time within which, or as of which, this condition, as defined, must be determined, within the meaning of the act. To fix that limit at time of patent or certification is only to *apparently* establish a limit, for such limit would be so devoid of certainty as to render it not a limit, in any proper sense of the word. The limitation would thereby be made dependent entirely upon the action of the grantor, which might be, on one pretext or another, indefinitely delayed. Title was not to pass by patent or certificate; it had already passed, to specifically attach at date of definite location. On that date the railroad company was entitled to patent, or formal quit-claim deed; and as of that date the limit of jurisdiction of the department was reached. The construction of the court certainly appears to be the reasonable one; that of the Interior Department, in that wherein it con-

flicts, an unreasonable one. We believe that the admitted condition is equivalent to the required condition, and that none of the lands can fall within this exception. Further, we think that it is clear that, in the light of the language and purposes of the granting act, the first question certified should be answered affirmatively.

QUESTION II.

Are the odd numbered sections of land within the place limits of the grant to the Northern Pacific Railroad Company, made by the act of Congress approved July 2, 1864, which have not been, and are not, known to be mineral, and which were, at the date of the grant and at the date of the filing the map of definite location in the office of the Commissioner of the General Land Office, not reserved, sold, granted or otherwise appropriated, and for which there were at said dates no entries or filings or applications to make entry or filing of any kind, of record in the United States district land offices for the districts in which such lands were situate, or in the office of the Commissioner of the General Land Office, taxable by the states and territories, after the filing of the map of definite location of said railroad and a full compliance, by said railroad company, with the terms and conditions of said grant-

ing act, so long as the United States refuses to patent or certify such lands to the railroad company for the reason that neither the United States nor its officers have ascertained or determined whether said lands are mineral or not and whether said lands were free from claims or rights at the date of said grant and of fixing the line of definite location opposite said lands, and while the question whether the title to said lands passed by virtue of said grant to said grantee is in controversy and pending before the Interior Department upon undetermined questions of fact?

In other words, is the mere pendency of the controversy as to title, upon the questions stated, before the Interior Department, in itself sufficient to render the lands non-taxable? It is evident that, before this question can be properly answered, it must be determined whether this controversy is *properly* pending before the department; or, more plainly, whether the decision of the department thereon must precede the passing or attaching of title. If it must, then title has not yet attached, and the lands are non-taxable; if it need not, then title has already attached under the admitted facts, and such decision can not affect it, and the lands are taxable.

We must, therefore, again note the extent of the jurisdiction of the department. Its jurisdiction to determine the questions of fact as to con-

dition of the land with reference to freedom from mineral, and from claims and rights, so long as those questions are legally undetermined, is not questioned. But these are mere questions of fact, and only such questions of fact as the granting act, as judicially construed, requires to be determined can be determined, properly, by the department. The department can not, of its own motion, extend its own jurisdiction beyond that limited by the act as construed by the courts.

Then it remains to determine only whether those questions of fact as defined by the courts, are still legally undetermined. The question certified, which we are now considering, admits the same conditions as does the first question certified, viz.: that none of the lands were, or are, known to be mineral, and that all of the lands were, at date of definite location, free from claims or rights, so far as the records then disclosed. If these admitted conditions are, as we contend, equivalent to the required conditions, then those questions of fact must now be regarded as determined, and any controversy based upon them, that may still be pending before the Interior Department, must necessarily be improperly pending, the subject matter being beyond the jurisdiction of the department, whether that controversy be between the United States and the rail-

road company or in the nature of a contest by a private person.

The answer to this question certified must, then, depend largely upon the answer to the first question certified; and if we are correct in our position upon that question, this question must be answered in the affirmative.

QUESTION III.

Are the said lands taxable prior to the furnishing by the grantee of affidavits of their non-mineral character; such non-mineral affidavits having been required by the Interior Department as a condition precedent to the issuance of patents for, or certification of, said lands to said railroad company?

We would not for a moment contend that said lands are taxable, if the furnishing of non-mineral affidavits is an act going to the foundation of the company's *right* to the patent. But that it is, or in any event could be made, such an act, we can not concede.

The only purpose of the required act must be to *identify* the lands, and such affidavits are only *prima facie* evidence of their non-mineral character. If our position upon the first question certified is correct, the lands have been identified already, and the question as to their non-mineral character has been already determined, within

the meaning of the granting act. And if our position upon that question is incorrect, still the same character of the lands has been already established (equally as fully, if not more firmly than could be done by the furnishing of the required affidavits), by the United States surveyors' reports which, as averred in the bill, show said lands to be non-mineral; such reports having been held to be *prima facie* evidence of such fact.

Kirby vs. Lewis, 39 Fed. Rep. 75.

From either standpoint, we can not perceive how the third question certified can be answered otherwise than affirmatively.

QUESTION IV.

Is Chapter 107 of the Laws of Dakota for 1889, being an act entitled "An act providing for the levy and collection of taxes upon property of railroad companies in this territory," approved March 7, 1889, in conflict with Section 8 of Article 1 of the Constitution of the United States, and void as a regulation of interstate commerce?

The act referred to is as follows:

"An act providing for the levy and collection of taxes upon property of railroad companies in this territory.

Be it Enacted by the Legislative Assembly of the Territory of Dakota:

"1. Percentage of Gross Earnings to be paid in lieu of other taxes.—In lieu of any and all other taxes upon any railroads, except railroads operated by horse power, within this territory, or upon the equipment, appurtenances or appendages thereof, or upon any other property situate in this territory belonging to the corporation owning or operating such railroads, upon the capital stock or business transactions of said railroad company, there shall hereafter be paid into the treasury of this territory an amount equal to a percentage of all the gross earnings of the corporation owning or operating such railroad, arising from the operating of such railroad, as shall be situated within this territory, both upon territorial and interstate traffic, in case the railroad company owning or operating such line shall accept and become subject to this act as hereinafter provided.

"Every such railroad corporation or person owning or operating or that may hereafter own or operate any line of railroad in this territory which shall have accepted this act shall pay to said treasurer each year "for the first five years" after the approval of this act an amount equal to three per centum of such gross earnings "and for and in each and every year after the expiration of such five years an amount equal to two per cent of said gross earnings," and the payment of

such amount annually as aforesaid shall be and is in full of any and all other taxation and assessment whatever upon the property aforesaid.

"Said payments shall be made, except as hereinafter provided, one-half on or before the 15th day of February, and one-half on or before the first day of August in each year. And for the purpose of ascertaining the gross earnings aforesaid, an accurate account of such earnings shall be kept by said company. An abstract shall be furnished by said company to the treasurer of this territory on or before the first day of February in each year, the truth of which shall be verified by the affidavits of the treasurer and secretary of such company, and for the purpose of ascertaining the truth of such affidavits and the correctness of such abstracts, full power is hereby vested in the governor of this territory, or any other person appointed by law, to examine under oath the officers, employes of said company or other persons, and if any person so examined by the governor or other authorized person shall knowingly or willfully swear falsely, concerning the matter aforesaid, every such person is declared to have committed perjury, and for the purpose of securing to the territory the payment of the aforesaid per centum, it is hereby declared that the territory shall have a lien upon the railroad of said company, and upon all property, estate or

effects of said company whatsoever, personal, real or mixed, and the lien hereby secured to the territory shall have and take precedence of all demands, decrees and judgments against said company.

"2. When Company Shall Fail to Make Return. —If any such railroad company having accepted this act shall fail to make return of its gross earnings as aforesaid, or of any part thereof, at the time and in the manner provided by law, and such default shall continue during the period of thirty days, such company shall be subject to a penalty of an amount equal to ten per cent of the tax imposed upon such company by this act, and the treasurer of the territory shall forthwith ascertain the amount of such percentage justly due from such company, as near as may be, from such evidence as may be available, and shall thereupon collect such amount so ascertained, together with the said penalty thereon.

"The amount so ascertained by the territorial treasurer as in this section provided, shall, together with the said penalty thereon, be by him entered in the books of his office and such entry when so made shall stand in the place of the report required by law to be made by such company and shall in all courts within this territory be evidence of the amount of such tax and

penalty and of the others fact stated therein in pursuance of this act.

"3. Neglect to Pay Taxes—In case any railroad company which shall have accepted the provisions of this act shall fail or neglect to pay the amount reported at the time and in the manner hereinafter provided, for a period of thirty days after the same shall have become due by the terms thereof, in such case there shall be added to the amount of such tax ten per centum as a penalty for such failure or neglect to pay.

"4. Territorial Treasurer to Distrain—At any time after the expiration of the period of thirty days after the amount as above provided has become due and payable under the provisions of this act, the territorial treasurer or his deputy shall distrain sufficient goods, chattels or other moveable property if found within this territory to pay the said amount due from such corporation, together with the penalty thereon as hereinafter provided and shall immediately advertise the sale of the same in at least three newspapers published within this territory, stating the time when, and the place where such property shall be sold; such sale shall take place at some point on the railroad of such delinquent company and at least four weeks notice of the time and place of such sale shall be given; such delinquent company, its successors or assigns may pay in such

amount and penalty at any time before the sale of the property distrained as herein provided, and thereupon further proceedings in connection with such distress shall cease and the property distrained shall be delivered to the owner therof.

"5. Land Subject to Taxation—The lands of any railroad company shall become subject to taxation in the same manner as other similar property as soon as the same are sold, leased, contracted to be sold or leased, and on or before the first day of April of each year each railroad company having lands within this territory shall return to the county clerk of each county within this territory full and complete lists, verified by the affidavit of such officers of the company having knowledge of the facts, of all lands of such company situated within such county sold or contracted to be sold or leased during the year ending the last day of December preceding, and the list furnished on or before the first day of April A. D. 1889, in compliance with the terms of this section, shall include a complete list of all lands sold or leased, prior to the last day of December, 1888.

"6. How Taxes Apportioned.—The moneys received and collected by the territorial treasurer in pursuance to this act shall be disposed of by him as follows: In case the railroad company paying such taxes owns no land granted in aid

of the construction of its railroad, one-third of the same shall be retained in the territorial treasury for the use of the territory and the remainder shall be apportioned among the several counties into or through which the railroad or railroads of such companies run, in proportion to the number of miles of main track situated in such counties respectively. In case the railroad company paying such tax owns land granted in aid of the construction of its railroad, then thirty per cent of the tax paid by such company shall be retained in the territorial treasury for the use of the territory and forty per cent shall be apportioned among the several counties into or through which the railroad or railroads of such company run, in proportion to the number of miles of main track situated in such counties respectively, aud thirty per cent shall be apportioned among the several counties in which the lands forming a part of its land grant are situated, in proportion to the number of acres of surveyed and unsold lands in said counties.

"7. Any Railroad Company.—Which at the date of the passage of this act owns or is engaged in operating any line or lines of railroad in this territory, may at any time within thirty days after the passage of this act, by resolution of its board of directors, attested by its secretary, and filed with the secretary of the territory, accept

and become subject to the provisions of this act, and provided that any railroad company assessed under chapter 99, of the laws of 1883, shall, within thirty days after the passage of this act, pay into the territorial treasury the full amount of the taxes and interest due under the assessments under said laws of 1883 before they can avail themselves of the provisions of this act, by accepting its terms, including taxes on both territorial and interstate earnings. It is further expressly provided that any company failing to strictly comply with the provisions of this act within the term herein provided shall be immediately subject to assessment and taxation in the manner provided for the assessment and taxation of the property of individuals of this territory and said taxes shall be collected in the same manner as is now provided in cases of the property of individuals. Any company which has not complied with the provisions of chapter 99 of the session laws of 1883 by paying all taxes claimed on gross earnings both territorial and interstate or by filing an account of gross earnings both territorial and interstate shall prepare and file such account in the manner therein provided within thirty days from the passage hereof, and pay one-half of the entire amount due under the agreement and acceptance herein referred to; for the current year, and also the entire amount of taxes hereto-

fore claimed by the territory on local and interstate earnings of such companies but remaining unpaid at the time of filing said account and within thirty days after the passage of this act, or the same shall not apply to such company or companies. The balance of said taxes due for the current year shall be paid to the territorial treasurer on or before the 15th day of August, 1889. Any railroad company that may be hereafter organized in this territory, or that shall hereafter become the owner of or engaged in operating any lines of railroad in this territory may accept and become subject to the provisions of this act by filing a resoluion of its board of directors in the manner as hereinbefore provided.

"In case any railroad company shall accept and become subject to the provisions of this act, it shall at the time of filing such aceeptance render an account of gross earnings both territorial and interstate, in the manner as hereinbefore provided, and shall pay at the time of rendering such account, all amounts claimed by the territorial auditor as tax due on the local and interstate earnings of such company for the current or any preceding year, and shall thereafter pay an amount equal to 3 per centum of such account as follows: If such acceptance is filed on or before the 15th day of February in any year, such company shall pay one-half of said

amount on said 15th day of February, and the balance on the 15th day of August following. Should such acceptance be filed before the 15th day of August and after the 15th day of February in any year, then an amount equal to 3 per centum of such account shall be paid in full on or before the 15th day of August in each year. Thereafter accounts shall be rendered and payment made in the manner provided in this act: PROVIDED, that any company failing to promptly and strictly comply with the provisions herein set forth and to pay all sums herein provided to be paid shall be subject to assessment and taxation in the same manner as individuals.

"8. In Case of Non-Acceptance.—The railroads and property of all railroad companies owning or operating lines of railway in this territory, which companies shall not accept and become subject to the provisions of this act, shall not be entitled to the exemption in this act contained, but shall be subject to taxation in such manner as shall be provided by law.

"9. Repeal or Amendment.—This act shall be subject to repeal or amendment by any future legislature, and nothing herein contained shall be construed as a repeal of any revenue law now in existence, as applicable to any railroad company which shall not accept the provisions of this act as herein provided.

"10. Effect When.—This act shall take effect and be in force from and after its passage.

"Approved March 7, 1889."

The question is, simply, whether the act under consideration imposed a tax upon commerce between the states.

This court has held that a state statute levying a tax upon the gross receipts of a railroad company, for the carriage of freight and passengers into, through, and out of the state, does impose such a tax.

Fargo vs. Stevens, 7 Supr. Ct. Rep. 857.

Also, that that part of a tax assessed, under a state law, upon receipts of a telegraph company, which is derived from interstate business, is such a tax.

Ratterman vs. Western Union Telegraph Co., 8 Supr. Ct. Rep. 1127.

It will be readily seen that the act imposed the burden of payment, by the railroad company into the territorial treasury, of a certain percentage of its gross receipts for the carriage of freight and passengers into, through and out of Dakota.

If that burden be in the nature of a tax, it must, therefore, be a tax imposed upon commerce between the states.

But the learned counsel for the appellant contends that this burden imposed was not a tax, but merely consideration for exemption from taxation.

A gross earnings law, similar to the act under consideration, was passed in 1875, by the legislature of Tennessee, in like manner exempting all other property of railroad companies, the effect of that law being made, by its terms, in like manner to depend upon acceptance by the railroad companies. The court in construing this law thus characterizes it:

"It was simply offering to this class of property holders the right to elect which of two modes of taxation they would adopt." * * * "It was in reality nothing but a tax law."

Ellis vs. L. & N. R. R. Co., 8 Baxter 530.

And the very act under consideration, itself assumes to impose a tax, providing for its collection in much the same manner as other taxes are usually collected; the title of the act being "An act providing for the levy and collection of taxes upon the property of railroad companies in this territory."

The burden imposed must be a tax if it is anything. If so, it evidently must be a tax upon

commerce between the states, and in conflict with Section 8 of Article 1 of the Constitution of the United States, and void as a regulation of interstate commerce.

QUESTION V.

Is Chapter 107 of the Laws of Dakota for 1889, being an act entitled "An act providing for the levy and collection of taxes upon property of railroad companies in this territory," approved March 7, 1889, in conflict with the Vth and XIVth Amendments to the Constitution of the United States, and void in so far as it attempts to exempt from taxation the lands granted by Congress by the act approved July 2, 1864, to aid in the construction of the Northern Pacific Railroad?

The two constitutional amendments are the same in their effects bearing upon this question, the Fifth limiting the power of Congress, and the Fourteenth being a limitation upon the power of the states.

Section 1 of the XIVth Amendment is as follows:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, or deny to any per-

son within its jurisdiction the equal protection of the laws."

It is not our contention that this amendment affects the power of a state to classify taxable property for the purpose of taxation: but only that it so limits that power as to prohibit classification of such property with reference only to its ownership and without regard to its peculiar character or distinctive use.

Nor do we contend that this amendment affects the power of the state to grant exemption of certain classes of property from taxation; but only that it so limits that power as to render it applicable only to classes of property used for the protection of the public well-being and not for any private end—such classes, for illustration, as are mentioned by the learned counsel for the appellant (p. 84).

Further, we do not question the showing made by the learned counsel, that even other classes of property were frequently exempted from taxation, and such exemption held valid, prior to the adoption of the XIVth Amendment; though we can not understand how the cases cited to show this can have any bearing upon the case at bar.

But farther than this we can not concede. We can not assent to the startling proposition which the learned counsel seems to assert (p. 103) that even the highest judicial tribunal in the land

may apply the doctrine of *stare decisis* and follow any heretofore prevailing construction of the fundamental law of the land "which the members of the court believe to be erroneous," whether that construction has been heretofore judicially placed upon it, or whether the constitutional limitation has been merely overlooked; for this would be an admission that the Constitution of the United States may be judicially declared of none effect, and that, too, by that tribunal to which the American people have so confidingly entrusted it for preservation. Nor can we assent to that other and still more startling proposition which the learned counsel seems to assert (p. 99), that the courts should long hesitate to set aside a legislative enactment, because that enactment embodies a constitutional construction as to the extent of the limitation of the power to pass such enactment; for this would be an admission that all constitutional limitations upon the powers of the states may be disregarded at will, and may be held for naught, even without judicial decision. Such reasoning, in either case, is dangerous and subversive of every principle upon which our government rests.

As to the limitation, by this amendment, upon the power to exempt taxable property from taxation, the sound reasoning of Justice Field can not well be improved upon. He says:

"Undoubtedly, since the adoption of that amendment the power of exemption is much more restricted than formerly; but that it may be extended to property used for objects of a public nature is not questioned. That is, when the property is used for the protection of the public well-being and not for any private end. Thus, property used for public instruction, for schools, colleges and universities which are open to all applicants on similar conditions, may probably be exempted. The public benefit is the equivalent to the state for the tax which would otherwise be exacted. If buildings used as churches for the public worship are also sometimes exempted, it must be because, apart from religious considerations, churches are regarded as institutions established to inculcate principles of sound morality, leading citizens to a more ready obedience to the laws. Whatever the exemption it can only be sustained for the public service or benefit received. The equality of protection which the XIVth Amendment declares that no state shall deny to anyone, is not thus invaded. That amendment requires that exactions upon property for the public shall be levied according to some common ratio to its value, so that each owner may contribute only his just proportion to the general fund." * * * "There undoubtedly are, and always will be, more or

less inequalities in the operation of all general legislation, arising from different conditions of persons, from their means, business or position in life, against which no foresight can guard. But this is a different thing, both in purpose and effect, from a carefully devised scheme to produce such inequality, or scheme, if not so devised, necessarily producing that result. Absolute equality may not be attainable, but gross and designed departure from it will necessarily bring the legislation authorizing it within the prohibition."

County of Santa Clara vs. Southern Pacific Railroad Company, 18 Fed. Rep. 396.

From this reasoning it follows that, while certain property belonging to railroad companies may probably be separately classed for purposes of taxation, by reason of its peculiar character or distinctive use, even then the rate of taxation must bear definite proportion to the value. A tax upon income has no reference to such value; and we submit, is not an enactment which imposes a tax without reference to the value of the property as classed for purposes of taxation, or which exempts taxable property used for private end alone, for some pecuniary consideration not based upon any standard of property value, a scheme to produce the very inequality prohibited by the XIVth Amendment,

whether or not it shows upon its face that the tax imposed or consideration paid is more or less than the legal tax would be? This seems too plain to admit of question.

QUESTION VI.

Is Chapter 107 of the Laws of Dakota for 1889, being an act entitled "An act providing for the levy and collection of taxes upon property of railroad companies in this territory," approved March 7, 1889, in conflict with the organic act of the territory of Dakota, in so far as it attempts to exempt from taxation the lands granted by Congress by the act approved July 2, 1864, to aid in the construction of the Northern Pacific Railroad?

Section 6 of the organic act referred to, as reenacted (Sec. 1925 R. S. U. S.) is as follows:

"In addition to the restrictions upon the legislative powers of the territories, contained in the preceding chapter, Section eighteen hundred and fifty-one, the Legislative Assemblies of Colorado, Dakota and Wyoming shall not pass any law impairing the rights of private property, nor make any discrimination in taxing different kinds of property, but all property subject to taxation shall be taxed in proportion to its value."

We do not contend that this section affected

the power of the legislative assembly to apportion taxation or to classify property for that purpose; but only that it limited the legislative assembly to two certain methods in the exercise of that power, viz: such method as should be free from discrimination either for or against any one kind of property relatively with other kinds of property, as so classed, and such method as should lay an *ad valorum* tax upon all property subject to taxation.

By different kinds of property is evidently meant the different species of property with reference to peculiar character or distinctive use; as, for instance, lands in general, as determined by peculiar character, or "railroad property" in particular, whether real or personal property or both, as determined by its distinctive use. Whatever the class, if subject to taxation all property belonging to it must be taxed by method free from discrimination either for or against it, considered relatively with all other classes of property subject to taxation, and that tax must be laid upon the property itself, in proportion to its value, and not upon the income from it.

But it is insisted that the intent of the act under consideration was to exempt the granted lands referred to, and the question certified which we are now considering seems to admit that intent.

It is contended that this section of the organic act did not withhold from the legislative assembly the power to exempt property from taxation. Great stress is laid upon the qualifying words, "subject to taxation," as they stand in that section, and the learned counsel for the appellant reasons that, as the legislative assembly must necessarily select the several classes of property that shall be subject to taxation, if in so doing it should omit any particular class or expressly exempt it, no property belonging to that class can be regarded as "subject to taxation."

We admit that the legislative assembly so far as any restriction which seems to have been imposed by the organic act was concerned, might proabably have exempted some particular classes of property from taxation, either expressly or by failure to select such classes of property as subject to taxation, and we have no reason to question the soundness of the many decisions referred to in support of this legislative power. But that under the organic act it was within the power of the legislative assembly to so exempt, from considerations purely of ownership, any property whatever belonging to and being an integral part of a specific class already selected as subject to taxation, is a proposition which can not be seriously entertained; because the method prescribed by the organic act regarding *all such* property

was, beyond question, that it should be taxed in proportion to its value.

Yet this is precisely what was attempted to be done by the legislative act under consideration. The legislative assembly had already selected lands in general (including such lands as are described in appellant's bill and which the legislative act under consideration attempted to exempt) as forming a class subject to taxation; Section 1543 of the Compiled Laws of Dakota, then in force (following the provisions of Section 1542 exempting certain property by classes designated with reference to peculiar character or distinctive use) providing as follows:

"All other property real and personal shall be subject to taxation in the manner provided in this chapter:

"1. Lands, and lots in towns and villages and cities, including lands bought from or donated by the United States and from the territory, and whether bought on credit or otherwise."

It will be readily seen that a part of the property (lands in general) which the act under consideration attempted to exempt, belonged to the above mentioned class of property then subject to taxation, and could not be separated from it by virtue of any distinctive use; and this, regardless of the question as to whether the attempted exemption did, or did not, properly include all of

one specific kind of property which, whether real or personal, is known by its distinctive use as "railroad property."

Still, the learned counsel reasons that this could not be in conflict with the spirit of the organic act, unless by reason thereof the tax levied upon others unjustly discriminated against them, impairing their rights of private property; and further, that this *could not* be the result, because the exemption was given in lieu of a valuable consideration. Then, following this somewhat startling proposition, cases are cited to show that it is not for the courts to inquire as to the adequacy or inadequacy of such consideration. Also, it is asserted that the legislative assembly had the power to aid in the construction and maintenance of any railroad, and that, consequently, whatever the railroad company would gain by reason of such a bargain, the exemption could not be in conflict with the spirit of the organic act, notwithstanding the express methods it prescribed.

If such reasoning be sound, we must admit that the full force and effect of the limitations imposed by the organic act may be easily reasoned away, and that those limitations are not only powerless but deceptive. The question before this court is not one of adequacy or inadequacy of consideration, nor a question as to the legis-

lative power to aid in the construction or maintenance of any railroad. It is a question simply of power of the legislative assembly as to method of apportioning taxation.

If the legislative assembly had the power to unite in one class all property owned by railroad companies, without regard to kind, and then, for such valuable consideration as it might in its discretion deem fit to accept, to exempt all of that arbitrarily formed class from taxation, manifestly it had the same power to unite in one class all property owned by farmers, without regard to kind, and then for valuable consideration, even if only nominal, exempt all of that arbitrarily formed class from taxation. Would this be unjust discrimination, or would it not? According to the reasoning of the learned counsel, it would not. And yet it would be more than unjust discrimination merely; it would be granting special privileges, and therefore in conflict with Section 1889 R. S. U. S. If so as to farm ownership, why not in equal degree as to railroad ownership?

But this question is by no means before the courts for the first time.

The constitution of Wisconsin contained the following provision:

"The rule of taxation shall be uniform, and taxes shall be levied upon such property as the legislature shall direct."

While the intent of this provision seemed much the same as that of the section of the organic law under consideration, almost unlimited discretion seemed to be given to the legislature in the selection of objects both for taxation and exemption. And yet the court, in construing this constitutional provision, say:

"It follows that when property is the object of taxation, it should all alike, in proportion to its value, contribute toward paying the expense of such benefits and protection. These are plain and obvious propositions of equity and justice, sustained, as we believe, by the letter and spirit of our Constitution."

Knowlton vs. Supervisors of Rock County, 9 Wis. 378.

The Constitution of Massachusetts required that all taxes should be "proportional;" which is evidently the intent of the language of the organic act under consideration. An act was passed in that state, requiring a certain class of owners of stock in corporations to pay a certain per centum of the dividends on such stock, as a tax. The court, holding the act void and construing this constitutional provision, say:

"It is clearly impossible that a tax of a fixed sum on a particular subject of taxation, which is not graduated either according to the whole sum required to be raised for public objects or by the value and amount of the entire property to be

assessed, can be levied on any element of proportion or have any relation to other taxes, which rise and fall according to the amount to be raised and the value of the property on which they are to be paid."

Oliver vs. Washington Mills, 11 Allen 275.

But the case of

People vs. McCreery, 34 Cal. 432,

is referred to by counsel for appellant, as practically supporting his contention rather than otherwise, the provision of the California Constitution which, as decided by the court, forbade exemptions, being as follows :

"Taxation shall be equal and uniform throughout the state. All property in this state shall be taxed in proportion to its value."

It is intimated that this decision turned upon the absence, so to speak, of the qualifying words "subject to taxation," which appear in the section of the organic act under consideration. But a careful reading of the opinion of the court does not bear out this theory. The court first considers the first constitutional provision above quoted, that "taxation shall be equal and uniform throughout the state," and that provision alone seemed, in the opinion of the court, sufficient to sustain its decision. Then, to remove all lingering doubt, the second provision, that "all property in this state shall be taxed in proportion to

its value," was separately considered. In so doing, the court casually alluded to the construction placed by the Supreme Court of the state of Missouri, upon a similar provision in the Constitution of that state, but containing the same qualifying words as are found in the Dakota organic act, the construction, by a majority of the court, being that *all* property within that state (Missouri) should be taxed.

But it is to the language of the California court in construing the *first* provision of the above quoted section of the California Constitution, that we desire to call particular attention, that provision agreeing in intent with the provision of the organic act under consideration. The court say:

"What is the import of the words 'taxation shall be equal and uniform throughout the state?' When the legislature has established a rate of taxation for general purposes, or to pay the funded debt, or for any or all of the purposes for which revenue is required, and, under the law, lands of one person, or situated in one county, are taxed at the same rate upon their assessed value as the lands of another person, or those situate in another county, then it may be said that the taxation is equal so far as lands are concerned. But it may be safely said that no member of the convention or elector who voted upon

the question of the adoption of the Constitution ever heard of an instance in the United States, where an *ad valorum* tax was levied and the same species of property owned by different persons and being in different counties was charged with different rates of taxation."

This language is far stronger than any we have used, but precisely in point. The Dakota act under consideration was an attempt to do indirectly this unheard of thing—*the separation into parts, of a single class of property* already made subject to taxation, such separation being made *only upon the ground of difference in ownership.* It seems clear beyond question, that the Dakota act under consideration is in conflict with the organic act of the territory of Dakota, and that the sixth question certified should be answered in the affirmative.

QUESTION VII.

Is Chapter 107 of the Laws of Dakota, being an act entitled "An Act providing for the levy and collection of taxes upon property of railroad companies in this territory," approved March 7th, 1889, to be considered as granting an exemption or commutation for and during the year 1889, or was such exemption or commutation to be in force and effect for and after the year 1890?

We do not dispute that, under Section 10, the *act* took effect immediately upon its approval, March 7, 1889; but we can not agree with the learned counsel in his conclusion that the *exemption* provided for did take effect, or under any circumstances could have taken effect, at the same time. It is manifest from the provisions of the act itself, that it must necessarily be in effect for some appreciable length of time before the exemption could possibly be effective; because the effectiveness of the latter, as to any particular railroad company, was, by the terms of the act, made contingent upon acceptance by such railroad company. Even such acceptance, so far as the Northern Pacific Railroad Company was concerned, was to be preceded by fulfillment of certain conditions, which might require further time for the taking effect of the exemption. The act itself allowed thirty days for the doing of the acts which must precede the taking effect of the exemption in any instance; and it may be readily seen that had no railroad company in the territory ever performed the required acts, the exemptions provided for would never have taken effect as to any; but that would not have affected the effectiveness of the act itself. Therefore, it is clear that it can not be said that Section 10 of the act fixes, or in any sense indicates, the time

of the taking effect of the exemption provided for.

Now, it not being expressly provided in any part of the act itself, that the exemption was to be in force and effect for and during the year 1889, it is hard to perceive, by construing together all parts of the act, and by construing them together with other acts then in force providing for the assessment, levy and collection of taxes, or even by construing them in the light of the provisions of the gross earnings law of 1883, how such could have been the intention of the lawmakers.

Upon the date on which the act under consideration took effect, more than two months had elapsed since the beginning of the year for and during which taxes for 1889 were to be assessed and levied, that year having commenced on January 1st. And the date as of which the act itself contemplated its becoming applicable to any particular railroad company, and as of which it did in fact become applicable to the Northern Pacific Railroad Company, was more than three months after the beginning of that tax year, and it was after the time as of which property should have been assessed for that year, with reference to ownership. This is clear from the provisions of Sections 1544 and 1547 of the Compiled Laws

of Dakota, then in force, the former providing as follows :

"On or before the twentieth day of January of each year, the board of county commissioners of each county shall provide for the use of the assessor suitable notices and blank forms for the listing and assessment of all property, and such instructions as shall be needful to secure full and uniform assessment and returns, and a list of all the entered lands in his county, or district, subject to taxation;" and the latter (section 1547) providing as follows:

"All taxable property real and personal shall be listed and assessed each year in the name of owner thereof as soon as practicable on or after the first Monday in May, including all property owned on the first day of April of that year." What year? The calendar year, of course; that was the *tax year*. The calendar year was recognized as the tax year also by the act under consideration; else why did it fix the month of February as the time when the *first* half of the gross earnings tax should be paid, and August as the time when the *last* half of that tax should be paid? February precedes August in the calendar year; but if the intent of the lawmakers had been that the tax year (as applicable to property of railroad companies) should begin at date of approval of the act, or a date of acceptance

thirty days afterward, then August would have preceded February in such tax year, and instead of the taxes in question being properly for the year 1889, they would have been for the tax year of 1889 and 1890. In such event, the company would have escaped taxation in any form for about one fourth of the year 1889, and it can hardly be presumed that such was the legislative intent. And yet this must be presumed to have been the legislative intent, if the exemption is to be considered as having been granted for and during the year 1889; because the act itself expressly provided, as we will notice more fully presently, that the *beginning* of the first year for which the per centum should be paid, and for which the exemption should be yielded, should be "after the approval of this act." In view of this express provision, the requirement that the companies should furnish, on or before April 1, 1889, a list of all lands sold, leased or contracted to be sold prior to December 31, 1888, can have no bearing. This requirement was to continue in like manner for and during subsequent years, and it was a provision similar to one contained in the gross earnings law of 1883. It was proper and necessary to continue the requirement, without break, as a means of assistance to the taxing officials, for it furnished them knowledge as to what lands the railroad companies still

owned, which would be just as important to know, if not more so, if those lands should not be exempt for 1889. Being, however, but a matter of convenience to the taxing officials, it was not such a requirement as could have been exacted gratuitously of the railroad companies; but it could nevertheless be made a condition for acceptance of the new act.

But the learned counsel is sure that he has found the answer as to the incipiency of the effectiveness of the exemption, in the construction "settled by the uniform contemporaneous practice" of officers and railroad companies, of the language of the gross earnings act in force in Dakota from March 9, 1883 to Jannary 29, 1889. So certain is counsel of this, that he ventures the assertion that "it must be presumed that the same words, when used in the act of 1889, were used in the same sense, to-wit: as creating an immediate exemption, in consideration of the obligation of the railroad companies to pay to the state during the year 1890 the percentage of of the earnings for the year 1889."

Let us test the correctness of this presumption. We make no question as to the construction placed by the learned counsel upon the act of 1883, because that construction is borne out by the plain language of the act itself; but we are at a loss to find "the same words" used in the act

of 1889, with reference to the exemption. Apart from the distinctive features of the two acts, with reference to acceptance by the railroad companies and conditions precedent thereto (the same being required by act of 1889, but not by act of 1883) the language in the one act, which indicates the time for effecting exemption or for raising the obligation as consideration therefor, is entirely dissimilar from that used in the other. That language as it appeared in the act of 1883 (in Section 1) was as follows: "Every such railroad corporation or person operating a railroad in this territory shall pay to said treasurer each year for the first five years after said railroad shall be or shall have been operated in whole or in part, two (2) per centum of such gross earnings; and for and in each and every year after the expiration of said five years, three (3) per centum of said gross earnings; and the payment of such per centum annually, as aforesaid, shall be and is in full of all taxation and assessments whatever upon the property aforesaid."

Thus the first exemption year under that act, as applicable to any particular railroad company, was made to depend on the fact of the operation of the railroad, to commence, as already provided by law with reference to assessment and levy of taxes, at the beginning of a calendar year; but it

was *not* limited to commence at a time *after the approval of the act.*

But the language of the act of 1889 in reference to the same matter (in Secfion 1) is as follows:

"Every such railroad corporation or person owning or operating or that may hereafter own or operate any line of railroad in this territory, which shall have accepted this act, shall pay to said treasurer each year 'for the first five years' after the approval of this act an amount equal to three per centum of such gross earnings 'and for and in each and every year after the expiration of such five years an amount equal to two per cent of said gross earnings,' and the payment of such amount annually as aforesaid shall be and is in full of any and all other taxation and assessment whatever upon the property aforesaid."

Thus the time of the beginning of the first exemption year was limited, by the express language of this act, to a period '*after the approval of this act.*' That year could not commence before date of approval, which was March 7th, and as the next tax year could not begin until January 1, 1890, it is plain that the act can not be considered as granting exemption for and during the year 1889, but that such exemption was to be in force and effect for and after the year 1890.

QUESTION VIII.

Is said bill without equity because of the failure to aver that the complainant has tendered or paid the "gross earnings tax" for the year 1889; and is said complainant entitled to the equitable relief prayed, without first tendering or paying such tax?

The learned counsel, while admitting that the amount to be paid as a condition precedent to invoking the aid of a court of equity is the amount conceded to be due, and while conceding that the appellant had obligated itself to pay an amount equal to 3 per centum of its gross earnings for and during the year 1889 as consideration for exemption from taxatlon upon its other property for that year, nevertheless seeks to excuse the appellant for its neglect to fulfill this obligation, giving as the reasons therefor:

1. That the gross earnings tax was not a tax upon the land.

2. That the exemption from assessment and levy in the ordinary manner, offered by the gross earnings act, did not depend upon the actual payment of said 3 per centum, in the first instance, but only upon filing acceptance.

3. That the act itself was repealed prior to time of first payment required thereunder, and

there was no one authorized to receive payment and give receipt and discharge therefor.

4. A valuable consideration for the exemption had been, in fact, given by the railroad company and retained by the state.

As to the first excuse offered, while the tax imposed was not a tax directly upon the lands, it was a tax imposed in lieu of all other taxes, including taxes with which the lands would otherwise be chargeable. This is the only ground upon which the appellant claims exemption from such taxes under this act. For the purpose of this discussion, we must of course admit the validity of this act and that the exemption it offered could have been made effective for the year 1889. This being the case, payment of the tax imposed by the act would have discharged all claims for taxes upon the lands for that year. Unless, then, those claims had been already discharged by mere acceptance of the act, they remain still undischarged, so long as payment of the tax imposed by the act is deferred, and the amount of that tax must be deemed to be the amount "conceded to be due" and which should be paid as a condition precedent to invoking the aid of a court of equity. But it is urged that those claims *had been already discharged* by mere acceptance of the act, which necessitates notice of the second excuse offered, viz: that the acceptance of the

act, and not payment thereunder, created the exemption as to the lands.

We can not so read the act. In the first section, after providing for payment of the per centum, it is expressly provided as follows :

"And the payment of such amount annually as aforesaid, shall be and is in full of any and all other taxation and assessment whatever upon the property aforesaid."

This is the very provision under which the appellant claims exemption, and yet it expressly makes that exemption dependent upon *payment.* But as if to make assurance doubly sure, the proviso in Section 7 expressly declares that

"Any company failing to promptly and strictly comply with the provisions herein set forth and to pay all sums herein provided to be paid, shall be subject to assessment and taxation in the same manner as individuals."

Could language be plainer?

The third excuse offered is that the act itself was repealed prior to time when the first installment became due, and there was no one authorized to received the money; and that, consequently, there is *no gross earnings percentage due.*

It is impossible to construe this statement in any other light than as an avowed unwillingness on part of appellant to pay the amount which it concedes to be due as consideration for the ex-

emption claimed. If the obligation was complete at time of acceptance (which is not disputed) the continuance of that obligation could not be made to depend upon the continuance in effect of the act under which it arose. The repeal of that act might, or might not, have weakened the remedy for enforcement; but in either event the obligation itself continued the same. And equity considers the obligation, not the weakness of the legal remedy to enforce it, in applying the maxim that he who seeks equity must do equity. Being then, at date of the taking effect of the Constitution of the State of North Dakota, a valid existing claim and chose in action belonging to the Territory of Dakota, it instantaneously passed to, and became vested in, the states of North Dakota and South Dakota, as provided by Section 5 Schedule, Constitution of the State of North Dakota, which is as follows:

"All property, real and personal, credits, claims and choses in action belonging to the Territory of Dakota at the time of the adoption of this constitution, shall be vested in and become the property of the states of North Dakota and South Dakota."

And Section 203 of the constitution seems to recognize those provisions of the act under consideration which provide for collection of unpaid taxes as still in force, by providing that that part

of the taxes going to the territory and based on the gross earnings for the year 1888, collected or to be thereafter collected from railroads within the limits of the proposed State of North Dakota, should belong to the State of North Dakota. That the same provision was not likewise made with reference to taxes for 1889, may be accounted for upon the theory that the members of the constitutional convention construed the provisions of the act of 1889 regarding exemption and obligation, as not being in effect for that year. But if the obligation did take effect for the year 1889 (as is admitted for purpose of this discussion) it is apparent that the appellant could have fully discharged it, had it been so disposed.

The *part* performance urged, places the appellant in no better position. Even that which was performed was not part performance of the obligation contracted by the acceptance of the terms and provisions of the act, but only the performance of a condition precedent to that acceptance. It could not in any sense be regarded as a part of the consideration for exemption for 1889, the amount paid having been claimed by the territory as tax, or consideration for exemption from taxation, for years preceding the year 1889, and having been paid as such.

No attempt to discharge the obligation con-

tracted for the year 1889 has been shown. It would seem as though the least that the appellant could have done, had it desired to do equity, would have been to aver its willingness to discharge that obligation. On the contrary, its unwillingness to do so is manifest. Is the complainant, then, entitled to the equitable relief prayed?

Respectfully submitted,

W. H. STANDISH,

Counsel for Appellee A. G. Clark, County Auditor of Kidder County, N. D.